THE AMERICAN

LAW TIMES REPORTS.

A COLLECTION OF

LEADING CASES DECIDED IN THE COURTS OF THE UNITED STATES, AND COURTS OF LAST RESORT OF THE STATES.

EDITED BY

ROWLAND COX.

"It is impoſſible but in proceſs of time, as well from the nature of things changing, as corruption of agents, abuſes will grow up: for which reaſon, the law muſt be kept as a garden, with frequent digging, weeding, turning, &c. That which in one age was convenient, and perhaps neceſſary, in another becomes an intolerable nuiſance." — ROGER NORTH.

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LEADING CASES

DECIDED IN THE COURTS OF THE UNITED STATES AND COURTS OF FINAL APPEAL OF ALL THE STATES.

NEW SERIES. — JANUARY, 1874. — VOL. I., No. 1.

SUPREME COURT OF THE UNITED STATES.

[DECEMBER, 1873.]

BANKRUPTCY. — FRAUDULENT PREFERENCE. — JUDGMENT AND LEVY OF EXECUTION.

WILSON v. *BANK OF ST. PAUL.*

Something more than passive non-resistance in an insolvent debtor is necessary to invalidate a judgment and levy on his property when the debt is due and he has no defence.

In such case there is no legal obligation on the debtor to file a petition in bankruptcy to prevent the judgment and levy, and a failure to do so is not sufficient evidence of an intent to give a preference to the judgment creditor, or to defeat the operation of the bankrupt law.

Though the judgment creditor in such a case may know the insolvent condition of the debtor, his judgment and levy upon his property are not, therefore, void, and are no violation of the act.

A lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy, though commenced within four months after levy of the execution or rendition of the judgment.

MR. JUSTICE MILLER delivered the opinion of the court.

This case comes before us on a certificate of division in opinion between the circuit and district judges for the District of Minnesota.

The statement of facts and the questions certified are as follows: —

The complainant is the assignee in bankruptcy of the firm of Vanderhoof Bros., lately merchants in the city of St. Paul. The defendant is the City Bank of St. Paul. The bill is filed to determine which of the parties is entitled to the stock of goods of the bankrupts, or the proceeds thereof. The assignee claims the goods, or the proceeds thereof, as

assets of the bankrupts' estate. The bank claims the same by virtue of a judgment, execution, and levy thereunder. The facts are as follows: —

On the 26th of February, 1870, judgment by default was rendered by one of the district courts of the State of Minnesota, in favor of the bank against Vanderhoof Bros. for the sum of $2,130. On the same day execution was issued, and the sheriff immediately made a levy upon the whole stock of goods of the debtors, which was sold by him for $2,385, which is now in the hands of the bankrupt court to await the determination of this suit. The suit by the bank was brought on promissory notes, commercial paper made by the debtors, Vanderhoof Bros., to the City Bank of St. Paul, one of which notes was more than fourteen days past due when suit was brought thereon by the bank.

After the levy of the said execution, and before the sale by the sheriff, Vanderhoof Bros. were adjudicated bankrupts on the petition of creditors filed against them after judgment had been obtained and levy made under the execution. The Vanderhoofs had no defence to the notes upon which the bank had sued them, and put in no defence. They had no property except their said stock in trade, which, at cost prices, was about equal to the amount of their liabilities.

The debtors, Vanderhoof Bros., were insolvent when said suit was brought against them by the bank, and the bank had then reasonable cause to believe it, and knew that they had committed an act of bankruptcy, and that they had no property but their said stock in trade. The Vanderhoofs gave no notice to any of their creditors of the suit commenced against them by the bank, and, having no defence, did not defend it nor go into voluntary bankruptcy, nor otherwise make any effort to prevent the judgment being obtained or the levy of the execution.

On the trial, the following questions arose, in relation to which the judges were opposed in opinion: —

I. Whether or not an intent on the part of said debtors, Vanderhoof Bros., to suffer their property to be taken on legal process, to wit, the said execution, with intent to give a preference to said bank, or with intent thereby to defeat or delay the operation of the bankrupt act, can be inferred from the foregoing facts.

II. Whether, under said facts, the said bank, in obtaining said judgment and making the said levy, had reasonable cause to believe that a fraud on the bankrupt act was intended.

III. Whether, under said facts, the bank obtained by the levy of the execution a valid lien on the said goods as against the assignee in bankruptcy.

The questions thus presented to this court require, for a satisfactory answer, a careful consideration and construction of sections thirty-five and thirty-nine of the bankrupt law, with reference to the general spirit and purpose of that law. In looking to these, the first and most important consideration which demands our attention is the discrimination made by the act between the cases of voluntary and involuntary bankruptcy. In both classes of cases, undoubtedly the primary object is to secure a just distribution of the bankrupt's property among his creditors, and in both, the secondary object is the release of the bankrupt from the obligation to pay the debts of those creditors.

But in case of voluntary bankruptcy, the aid of the law is invoked by the bankrupt himself, with the purpose of being discharged from his debts as his principal motive; and in the other the movement is made by his creditors with the purpose of securing the appropriation of his property to their payment, the discharge being with them a matter of no weight and often contested.

There is a corresponding difference in the facts on which the action of this court can be invoked in these different classes of bankruptcy. When the party himself seeks the aid of the court, the averment he is required to make is a very simple one, namely, "that he is unable to pay all his debts in full, and is willing to surrender all his estate and effects for the benefit of his creditors, and desires to obtain the benefit of the act," that is, to be discharged from the claims of his creditors. On filing a petition containing this request, he is declared by the court a bankrupt. The allegation cannot be traversed, nor is any issue or inquiry as to its truth permitted. The administration of his effects proceeds thereafter under the direction of the court, and may end in paying all his debts with a surplus to be returned to the bankrupt, or the result may be nothing for the creditors, and the unconditional release of the bankrupt.

But while the debtor may, on this broad basis, call on the court to administer his estate, the creditor who desires to do the same thing is limited to a few facts or circumstances, the existence of which are essential to his right to appeal to the court. And when any one of these facts is set forth in a petition to the court by the creditor, the truth of the allegation may be denied by the debtor, and on the issue thus found, he may demand the verdict of a jury.

The reason for this wide difference in the proceedings in the two cases is obvious enough. When a man is himself willing to refer his embarrassed condition to the proper court, with a full surrender of all his property, no harm can come to any one but himself, and there can be no solid objection to the course he pursues. But when a person claims to take from another all control of his property, to arrest him in the exercise of his occupation, and to impair his standing as a business man, — in short, to place him in a position which may ruin him in the midst of a prosperous career, the precise circumstances or facts on which he is authorized to do this should not only be well defined in the law, but clearly established in the court.

It is the thirty-ninth section of the bankrupt act which lays down, in nine or ten subdivisions, the facts and circumstances which give a man's creditors the right to have him declared a bankrupt, and his property administered in a bankruptcy court. One of them is the case of a person who, being bankrupt or insolvent, or in contemplation of insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or give any warrant to confess judgment, or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who may be liable for him as indorsers, bail, sureties, or otherwise, or with intent by such disposition of his property to defeat or delay the operation of the act. And the same section declares, that if such person shall be adjudged a bankrupt, the assignee may recover back the

money or property so paid, conveyed, sold, assigned, or transferred, contrary to the act; provided, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on the bankrupt act was intended, or that the debtor was insolvent.

The case before us is one of involuntary bankruptcy, but there is no question here whether the party was rightfully declared a bankrupt. The statement of facts shows that the debtors were insolvent when the bank commenced its proceedings in the state court, and that the bank had then reasonable cause to believe they were insolvent, and knew that they had committed an act of bankruptcy, to wit, had permitted one of their notes to go unpaid more than fourteen days after it was due.

It is maintained that under these circumstances the bankrupt "suffered his property to be taken on legal process with intent to give preference to the bank, and to defeat or delay the operation of the act." Undoubtedly, the facts stated bring the bank within the proviso, as to knowledge of the debtor's insolvency; and if the debtor suffered his property to be taken within the meaning of the statute, with intent to defeat or delay the operation of the act, then the assignee should recover the property, so that this sufferance and this intent on the part of the bankrupt are the matters to be decided.

The thirty-fifth section of the act, which is designed to prevent fraudulent preferences of a person in contemplation of insolvency or bankruptcy, declares that any attachment or seizure under execution of such person's property, *procured by him* with a *view* to give such a preference, shall be void if the act be done within four months preceding the filing of the petition in bankruptcy by or against him. Though the main purpose of the thirty-ninth section is to define acts of the trader which make him a bankrupt, and that of the thirty-fifth is to prevent preferences by an insolvent debtor in view of bankruptcy, both of them have the common purpose of making such preferences void, and enabling the assignee of the bankrupt to recover the property, and both of them make this to depend on the intent with which the act was done by the bankrupt, and the knowledge of the bankrupt's insolvent condition by the other party to the transaction. Both of them describe, substantially, the same acts of payment, transfer, or seizure of property so declared void. It is, therefore, very strongly to be inferred that the act of *suffering* the debtor's property to be taken on legal process in section thirty-nine is precisely the same as procuring it to be attached or seized on execution in section thirty-five. Indeed, the words *procure* and *suffer* are both used in section thirty-nine.

What, then, is the true meaning of that phrase in the act? In both cases it must be accompanied with an intent. In section thirty-five it is to give a preference to a creditor; in section thirty-nine it must be to give a preference to a creditor, or to defeat or delay the operation of the bankrupt act. In both there must be the positive purpose of doing an act forbidden by that statute, and the thing described must be done in the promotion of this unlawful purpose.

The facts of the case before us do not show any positive or affirmative act of the debtors from which such intent may be inferred. Through the whole of the legal proceedings against them they remained perfectly passive. They owed a debt which they were unable to pay when it became

due. The creditor sued them and recovered judgment, and levied execution on their property. They afforded him no facilities to do this, and they interposed no hindrance. It is not pretended that any positive evidence exists of a wish or design on their part to give this creditor a preference, or oppose or delay the operation of the bankrupt act.

There is nothing morally wrong in their course in this matter. They were sued for a just debt. They had no defence to it, and they made none. To have made an effort by dilatory or false pleas to delay a judgment in the state court, would have been a moral wrong, and a fraud upon the due administration of the law. There was no obligation on them to do this, either in law or in ethics. Any other creditor whose debt was due could have sued as well as this one, and any one of them could have instituted compulsory bankrupt proceedings. The debtor neither hindered or facilitated any one of them. How is it possible from this to infer, logically, an actual purpose to prefer one creditor to another, or to hinder or delay the operation of the bankrupt act?

It is said, however, that such an intent is a legal inference from such inaction by the debtor, necessary to the successful operation of the bankrupt law; that the grand feature of that law is to secure equality of distribution among creditors in cases of insolvency; and that, to secure this, it is the legal duty of the insolvent, when sued by one creditor in an ordinary proceeding likely to end in judgment and seizure of property, to file himself a petition of voluntary bankruptcy, and that this duty is one to be inferred from the spirit of the law, and is essential to its successful operation.

The argument is not without force, and has received the assent of a large number of the district judges, to whom the administration of the bankrupt law is more immediately confided.

We are, nevertheless, not satisfied of its soundness.

We have already said that there is no moral obligation on the part of the insolvent to do this, unless the statute requires it, and then only because it is a duty imposed by the law. It is equally clear that there is no such duty imposed by that act, in express terms. It is, therefore, an argument solely of implication. This implication is said to arise from the supposed purpose of the statute to secure equality of distribution in *all cases* of insolvency, and to make the argument complete, it is further necessary to hold that this can only be done in bankruptcy proceedings under that statute. Does the statute justify so broad a proposition? Does it in effect forbid all proceedings to collect debts in cases of insolvency in other courts, and in all other modes than by bankruptcy? We do not think that its purpose of securing equality of distribution is designed to be carried so far.

As before remarked, the voluntary clause is wholly voluntary. No intimation is given that the bankrupt *must* file a petition under any circumstances. While his *right* to do so is without any other limit than his own sworn averment that he is unable to pay all his debts, there is not a word from which we can infer any legal obligation on him to do so. Such an obligation would take from the right the character of a privilege, and confer on it that of a burdensome, and, often, ruinous duty.

It is, in its essence, involuntary bankruptcy. But the initiation in this kind of bankruptcy is, by the statute, given to the creditor, and is not im-

posed on the debtor. And it is only given to the creditor in a limited class of cases. The argument we are combating goes upon the hypothesis that there is another class given to the creditor by inference, namely, where the debtor ought himself to go into court as a bankrupt and fails to do it. We do not see the soundness of this implication from anything in the statute.

We do not construe the act as intended to cover *all* cases of insolvency, to the exclusion of other judicial proceedings. It is very liberal in the class of insolvents which it does include, and needs no extension in this direction by implication. But it still leaves, in a great majority of cases, parties who are really insolvent to the chances that their energy, care, and prudence in business may enable them finally to recover without disastrous failure or positive bankruptcy. All experience shows both the wisdom and justice of this policy.

Many find themselves with ample means, good credit, large business, totally insolvent; that is, unable to meet their current obligations as fast as they mature. But by forbearance of creditors, by meeting only such debts as are pressed, and even by the submission of some of their property to be seized on execution, they are finally able to pay all, and to save their commercial character and much of their property. If creditors are not satisfied with this, and the parties have committed an act of bankruptcy, any creditor can institute proceedings in a bankrupt court. But until this is done, their honest struggle to meet their debts and to avoid the breaking up of all their business is not, of itself, to be construed into an act of bankruptcy, or a fraud upon the act.

It is also argued, that inasmuch as to lay by and permit one creditor to obtain judgment and levy on property necessarily gives that creditor a preference, the debtor must be supposed to intend that which he knows will follow.

The general legal proposition is true, that where a person does a positive act, the consequences of which he knows beforehand, that he must be held to intend those consequences. But it cannot be inferred that a man intends, in the sense of desiring, promoting, or procuring it, a result of other persons' acts, when he contributes nothing to their success or completion, and is under no legal or moral obligation to hinder or prevent them.

Argument confirmatory of these views may be seen in the fact that all the other acts or modes of preference of creditors found in both the sections we have mentioned, in direct context with the one under consideration, are of a positive and affirmative character, and are evidences of an active desire or wish to prefer one creditor to others. Why, then, should a passive indifference and inaction, where no action is required by positive law or good morals, be construed into such a preference as the law forbids?

The construction thus contended for is, in our opinion, not justified by the words of either of the sections referred to, and can only be sustained by imputing to the general scope of the bankrupt act a harsh and illiberal purpose, at variance with its true spirit and with the policy which prompted its enactment.

Undoubtedly very slight evidence of an affirmative character of the

existence of a desire to prefer one creditor, or of acts done with a view to secure such preference, might be sufficient to invalidate the whole transaction. Such evidence might be sufficient to leave the matter to a jury, or to support a decree, because the known existence of a motive to prefer or to defraud the bankrupt act would color acts or decisions otherwise of no significance. These cases must rest on their own circumstances. But the case before us is destitute of any evidence of the existence of such a motive, unless it is to be imputed as a conclusion of law from facts which we do not think raise such an implication.

These latter considerations serve to distinguish the present case from that of *Buchanan* v. *Smith*, 16 Wall., decided at last term, and which may seem to conflict, in some of the expressions used in that opinion, with those found in this. That was a bill in chancery, involving several distinct issues of fact, on which much and conflicting testimony was given, and the contention was mainly as to what was established by the evidence. There was satisfactory proof that the creditor, before pursuing his remedy in the state court, had urgently sought to secure a preference by obtaining from the debtor a transfer of certain policies of insurance on which a loss was due. The case was also complicated by an assignment made by the debtor, under which the assignee took possession before the creditor procured his judgment in the state court. That case was well decided on the evidence before the court. But in the case now before us, the questions we have discussed are presented nakedly and without confusion, by facts found by the court and undisputed, and we have been compelled, on careful consideration of the bankrupt act, to the following conclusions: —

1. That something more than passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due and he is without just defence to the action, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the bankrupt act.

2. That the fact that the debtor, under such circumstances, does not file a petition in bankruptcy, is not sufficient evidence of such preference or of intent to defeat the operation of the act.

3. That, though the judgment creditor in such case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the bankrupt law.

4. That a lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition.

These propositions require the questions certified to us to be answered as follows: The first and second in the negative, and the third in the affirmative.

SUPREME COURT OF NEW HAMPSHIRE.

[52 N. H. 596.]

RAILROAD. — PUNCTUALITY IN ARRIVAL AND DEPARTURE OF TRAINS. — NEGLIGENCE. — FAILURE TO STOP AT PARTICULAR STATION.

GORDON v. *MANCHESTER AND LAWRENCE RAILROAD.*

The publication of a time-table, in common form, imposes upon a railroad company the obligation to use due care and skill to have the trains arrive and depart at the precise moments indicated in the table; but it does not import an absolute and unconditional engagement for such arrival and departure, and does not make the company liable for want of punctuality which is not attributable to their negligence.

G. purchased of the M. & L. R. R. a season ticket from S., an intermediate station, to M. The railroad company published a time table, in common form, upon which a train was advertised as leaving L. at 8.27 A. M., *leaving S. at* 8.45, *and arriving at M. at* 9.35 A. M. *G. was at S. depot in season to take this train, but the train ran by S. without stopping. In an action of assumpsit, brought by G. against the railroad company to recover damages for their failure to transport him seasonably to M., the railroad company offered to prove that the road was suitably equipped for transporting the usual travel, and for accommodating the excess ordinarily to be anticipated from extraordinary occasions; that, on the morning in question, an extraordinary, unusual, and unexpected number of persons appeared at L. to take passage, and there, and at other stations before reaching S., so completely filled and overloaded the cars that it would have been dangerous to have admitted more passengers on the train; that at S. there were, besides the plaintiff, a large number of persons waiting for transportation, whom it would have been impossible to have taken into the already overloaded cars; that the railroad company could not have discriminated as to whom they would take or decline to take, even if they had had the means to transport any of them; that the train consisted of eighteen passenger cars and one baggage car, and that, if the train had stopped at that station, being on an up grade, it would have been impossible to have started it; that the railroad company had no reason to expect that such an unusual number of persons would apply for transportation on that morning; and that, on the arrival of the train at M., and as soon as the same could be done with safety to the travelling public, they sent back the train to S. to bring the plaintiff, and all other persons desiring transportation, to M.*

Held, that the railroad company were not liable, if they had done all that due care and skill could do to transport the plaintiff punctually; and that the proposed evidence was admissible, as tending to show that the failure to transport the plaintiff was not attributable to negligence on the part of the railroad company.

ASSUMPSIT, by George C. Gordon against the Manchester & Lawrence Railroad. The declaration alleged in substance that the defendants, in consideration of a payment of twenty dollars, promised the plaintiff to transport him between Salem, N. H., and Manchester, N. H., by the regular trains between said Salem and Manchester, for the space of three months, ending September 30, 1870; that on September 8, 1870, the plaintiff was at Salem station, ready and anxious to be transported in the regular morning train to Manchester, but that the defendants neglected

and refused to stop at Salem station the train due there, and which arrived there at 8.52 A. M. that day, and neglected and refused to transport the plaintiff to Manchester by the train aforesaid, or in any other manner, during the forenoon of that day.

Plea, the general issue, with a brief statement.

The plaintiff testified that he purchased a ticket of the defendants, on or about July 1, 1870, of which the following is a copy: —

"Manchester & Lawrence Railroad, Season ticket. Pass George C. Gordon for three months, ending September 30, 1870, between Salem and Manchester. CHAS. E. TWOMBLY, G. T. A."

The plaintiff testified that he was at Salem station on the morning of September 8, ready to take the morning train, but that said train did not stop at Salem, and that he did not arrive at Manchester until two o'clock in the afternoon.

The plaintiff having rested, the defendants moved for a nonsuit. The motion was denied, and the defendants excepted.

The defendants then offered to prove the facts stated in the brief statement, as follows: "That said defendants have at all times before, and on the said September 8, 1870, and since, supplied said railroad with a good and sufficient number of suitable cars and locomotives for transporting the usual and regular travel on said road, and for accommodating the excess ordinarily to be anticipated from extraordinary occasions. That on said September 8, when the plaintiff alleges that he was not taken by the morning train, an extraordinary, unusual, and unexpected number of persons appeared at Lawrence to take passage on the train, and there, and at Methuen and Messer's, so completely filled the passenger and baggage cars as to occupy all the seats, fill the aisles and platforms, and otherwise overload the cars, so that it would have been dangerous to have admitted more passengers on the train; that at said station of Salem there was, besides the plaintiff, a large number of persons — to wit, one hundred — waiting for transportation, whom it would have been impossible to have taken into the already overloaded cars, and it would have been dangerous to the safe transportation of the passengers already on the train to have permitted any of the persons at the said station of Salem to get on board, and that the defendants could not have discriminated as to whom they would take or decline to take, even if they had had the means to transport any of them; that the defendants were common carriers, and were and are bound to receive and carry all persons asking transportation, so far as their means would allow, and had no right to refuse transportation because they anticipated that at some other station there might be other persons also claiming transportation; and that the defendants had no reason to expect that such an unusual number of persons would apply for transportation on the morning of the said September 8; and that the defendants, on the arrival of the train in Manchester, and as soon as the same could be done with safety to the travelling public, sent back the train to said Salem to bring the plaintiff, and all other persons desiring transportation, to Manchester, which was all that said defendants were bound to do in law."

The defendants also offered to prove that the train consisted of eighteen passenger cars and one baggage car, and that, if the train had

stopped at that station, being on an up grade, it would have been impossible to have started it.

The evidence offered was all excluded; and the defendants excepted.

The court charged the jury that the defendants were liable for not carrying the plaintiff, and that it made no difference by what means they were prevented from fulfilling their contract.

The jury returned a verdict for the plaintiff. The defendants moved to set aside the verdict; and the questions thus arising were reserved for the law term.

At the law term the defendants conceded that during the entire year 1870 they published a time-table, in the usual form, upon which a train was advertised as leaving Lawrence at 8.27 A. M., leaving Salem at 8.45, and due at Manchester at 9.35 A. M.

Marston, for the plaintiff.

S. C. Eastman & G. C. Bartlett, for the defendants.

SMITH, J. In order to decide whether the evidence offered by the defendants was rightly rejected, it is indispensable to determine what the contract was. If the defendants entered into an absolute and unconditional engagement to transport the plaintiff to Manchester at the precise hour and minute named in the time-table, the ruling of the court was correct. If, on the other hand, the defendants only engaged to do all that due care and skill could do to insure punctuality, a different result may follow.

A common carrier of passengers is a person upon whom the law imposes particular obligations; "and all persons are supposed to deal with the carrier on the terms which the law predetermines, unless they specially provide otherwise." "A particular arrangement is determined by a provision of the law, subject to be altered by a special convention between the parties." Where the contract is in general terms, or is not expressed in words at all, and there are no external circumstances indicating the intention of the parties that the carrier should assume more or less than his ordinary liability, the contracting parties are regarded as tacitly adopting and incorporating into their contract the common law provisions relative to the obligations and liabilities of common carriers of passengers. It would be an idle ceremony for the parties to go through the form of uttering words which "express no more than the law by intendment would have supplied."

By the common law, common carriers of passengers are bound to use due care and skill to transport passengers safely and promptly; but they are not insurers of results; they are not held liable as absolute warrantors of safety or speed. The burden of proof rests on the party asserting that the carriers entered into an engagement more onerous than that which the common law imposes on them. We have now to inquire what circumstances there are, in the present case, to indicate that the defendants assumed so much more than their common law liability as to become absolute warrantors of punctuality.

The plaintiff paid his fare in advance.

This is nothing more than what the great majority of passengers do, without any idea that the carriers are thereby made to incur any unusual responsibility. Nor does it appear that the plaintiff understood that his

payment in advance for the season gave him any especial preference over passengers who had paid in advance for a single passage. It is not suggested that season passengers were charged an extra price. In all probability, each trip cost the plaintiff a much smaller average sum than if he had paid single fares.

The plaintiff had a ticket.

It has been said by this court that "ordinarily the ticket is not and does not contain the contract." *Johnson* v. *Concord R. R.* 46 N. H. 213, p. 219. And it has been asserted that a ticket is rather in the nature of a receipt for the passage money, — "a mere token or voucher adopted for convenience, to show that the passenger has paid his fare from one place to another." Denio, J., in *Quimby* v. *Vanderbilt*, 17 N. Y. 306, p. 313; Earl, Com., in *Rawson* v. *Penn. R. R. Co.* 48 N. Y. 212, p. 217. Certainly, the ticket now in question does not purport to express, and does not express, all the terms of the contract. If this were held otherwise, the plaintiff might find it difficult to make out even a *primâ facie* case. Looking only at the literal language of the ticket, and considering it as the sole and conclusive evidence of the terms of the contract, it might be said that the plaintiff has had all that the ticket entitled him to, namely, a passage to Manchester. The ticket does not specify that trains shall run at reasonable hours, or with reasonable dispatch, much less that they shall run at regular and fixed hours. It is obvious that neither party can fairly be asked to regard the ticket as expressing all the terms of the contract. There is nothing in this ticket to indicate that the contract was an unusual one, or made upon any other basis than the common law obligations of carriers. It was unnecessary that the ticket should express in words what the law tacitly implies. "*Expressio eorum quæ tacite insunt nihil operatur.*" (For instances of contracts in general terms, which are construed as containing implied conditions exonerating a party who is without fault, see *Dexter* v. *Norton*, 47 N. Y. 62; note to *Hall* v. *Wright*, 96 Eng. Com. Law, p. 795; *Robinson* v. *Davison*, L. R. 6 Exch. 269; *Taylor* v. *Caldwell*, 3 Best & Smith, 826; also, L. R. 4 C. P. 1 Ibid. 744.)

The defendants had published a time-table, upon which a train was advertised as leaving Lawrence at 8.27 A. M., leaving Salem at 8.45 A. M., and due at Manchester at 9.35 A. M.

Undoubtedly, "the representations made by railway companies in their time-tables cannot be treated as mere waste paper." Lord Campbell, C. J., in *Denton* v. *Great Northern Railway Co.* 5 El. & Bl. 860, p. 865. It must be conceded that such a public advertisement at least imposes on the defendants the obligation of using due care and skill to have their trains arrive and depart at the times thus indicated. For any want of punctuality which they could have avoided by the use of due care and skill, they are unquestionably liable. Nor can they excuse a non-conformity to the time-table for any cause, the existence of which was known or ought to have been known to them at the time of publishing the table. "They make the time advertised a criterion of ordinary reasonable time." The publication of the time-table cannot amount to less than this, viz., a representation that it is ordinarily practicable for the company, by the use of due care and skill, to run according to the table, and an engagement on

their part that they will do all that can be done by the use of due care and skill to accomplish that result. Does it go beyond this? Does it amount to an absolute, an unconditional engagement, that the trains shall arrive and depart at the precise moments indicated in the table? Does it make the company warrantors or insurers of punctuality, and liable for delays which are due, not to their fault, but to pure accident?

If these questions are answered in the affirmative, a very singular result will follow. Railroad companies will be under a much more onerous obligation to run punctually than to run safely. They may, then, on the same state of facts, be held liable for the loss of an hour's time, and not liable for the loss of a year's time or for the loss of a limb. As to safety, they are bound only to use due care and skill to attain it. They are not liable for mishaps which are not attributable to their negligence. *Readhead* v. *Midland R. Co.* L. R. 4 Q. B. 379, p. 381. Suppose the morning train had reached Salem "on time," taken the plaintiff on board, and proceeded towards Manchester; that midway between Salem and Manchester the train had been thrown from the track in consequence of the breaking of a wheel; that such breakage was caused by a latent defect which could not have been previously detected; that the plaintiff by this accident lost a limb, and was permanently incapacitated for labor; and that, after some delay, the plaintiff and the other passengers were carried on by another train, so that they reached Manchester three hours late on the same day: in such a case, it is clear that the defendants are not liable to the plaintiff for the bodily injury, nor for his loss of time after reaching Manchester. Does it not seem extraordinary that they should be liable for the loss of the three hours' time, when they are not liable for the loss of the three years' time since elapsed, or for the loss of the limb? Is it natural to suppose that the parties understood the obligation to carry speedily, to be more rigid than the obligation to carry safely? A large proportion of passengers might consider the latter obligation the more important of the two, and might prefer delay to death. It is not now suggested that the defendants could not impose upon themselves a liability in respect to punctuality, far in excess of their obligations in other respects. But in considering whether they have done so, the incongruous nature of such action on their part may be entitled to some weight. We should naturally expect the party alleging such action to offer very explicit evidence of it. The case is unlike that of a charter-party. There, the parties enter into a written agreement which, presumably, expresses all the terms of the contract. If, in such an agreement, it is stipulated that the ship shall sail on or before a particular day, there may be no good reason for giving this express stipulation any other than a strictly literal construction, or for implying conditions or limitations not named in the writing. See *Glaholm* v. *Hays*, 2 Man. & Gr. 257; *Croockewit* v. *Fletcher*, 1 Hurl. & Norm. 893. In the present case, there is no formal contract, either written or oral. The great inquiry is, What was the contract? The nature of the contract is to be gathered from various documents and circumstances. The time-table is only one among several pieces of evidence, from all of which, taken all together, the contract is to be inferred.

The importance of punctuality is undeniable, but so is the importance

of safety. The serious results of a failure in either respect may be weighed in determining whether the carriers have used due care and skill; but the importance of success does not furnish conclusive evidence that the company have absolutely guaranteed against failure. Moreover, the known difficulty of attaining absolute punctuality throughout a whole year may be taken into account as a sort of offset to the argument founded on the importance of punctuality. This difficulty may diminish the probability that the company would assume such a rigorous obligation. In *Howard* v. *Cobb*, 19 Monthly Law Reporter, 377, the contract related only to a single trip of a steamer. But here, there is no ground for asserting that the defendants made any different agreement relative to their morning train on September 8, so far as punctuality is concerned, from that entered into respecting all their other regular trains throughout the whole year. Practically, the question is, whether they have undertaken to guarantee exact punctuality in the arrival and departure of all their trains throughout a whole year. We are not reduced to the dilemma of considering the time-table as evidence of such a guaranty, or else giving it "no meaning and effect at all." As has already been intimated, much effect can be given to it, as increasing the obligations of the defendants, without construing it as an absolute warranty of punctuality.

Upon the whole, we think that there is no evidence that the defendants entered into an absolute and unconditional engagement that the trains should depart and arrive at the precise moments indicated in the time table. The defendants were not liable for the failure to carry the plaintiff in the morning, unless that failure was attributable to their negligence, to their neglecting to do all that due care could do to run in conformity to the time-table. The rejected evidence tended to show that the failure was not attributable to their negligence. It should, therefore, have been received, and submitted to the consideration of the jury.

An examination of reported decisions does not disclose any strong preponderance against the views now expressed. In most cases, the negligence of the carrier has been proved or admitted.

Hawcroft v. *Great Northern R. Co.*, as sometimes cited, might seem strongly against the defendants; but, as reported, its bearing in that direction is not so obvious. It is a case decided by Patteson, J., and Wightman, J., in the queen's bench, in 1852, and is reported in 16 Jurist, 196, 8 Eng. Law & Eq. 362, and more fully in Law Journal, vol. 30 N. S., vol. 21 Qu. B. 178. The plaintiff purchased an excursion ticket from Barnsley to London and return. Upon the back of the ticket were the words, "To return by the trains advertised for that purpose on any day not beyond fourteen days after date hereof." The defendants advertised certain trains for excursion ticket holders, including one train leaving London at 6.45 A. M. on Saturday, and another at 9.15 P. M. Upon all the facts, the court seem to have concluded, and we think correctly, that the plaintiff had a right to understand that both trains were advertised as carrying through to Barnsley. The plaintiff went to the London station as early as 6 A. M. on Saturday; but the pressure of persons wishing to be passengers by that train was so great that he was unable to obtain a seat in it, although it consisted of thirty carriages drawn by two engines. The company caused an extra train of twenty-three carriages to be sent

about noon, but this train was also filled without the plaintiff's being able to procure a place. The company made every exertion to procure and send off another extra train during the day, but were unable to do so for want of sufficient engines, carriages, and servants at the London station to meet the extraordinary influx of returning excursion passengers on that morning, although they were sufficiently supplied for the ordinary excursion traffic of the company. The defendants contended that it would have been unsafe to have dispatched the 6.45 A. M. train with more than two engines, or with a greater number of carriages; but it was conceded that a sufficient number of trains to convey all excursion ticket-holders might have been dispatched with safety long before noon, if the company had been provided with a sufficient number of engines, cars, and servants for the purpose at the London station. It was claimed that the transportation provided would have been sufficient to accommodate all applicants on any other Saturday morning for two months, and that the number of applicants on the Saturday morning in question was greater than on any other Saturday. The plaintiff took passage in the 9.15 P. M. train, which carried him only as far as Doncaster. No arrangement had been made for carrying him thence to Barnsley, and no train ran thither until Monday. The county judge, at the trial, ruled that there was a special contract binding the defendants to carry the plaintiff by the 6.45 A. M. train, or by some other train within a reasonable time after that hour; that carrying by the 9.15 P. M. train was not a sufficient compliance with the contract, but, if so, there was a breach in carrying no further than Doncaster; that the extraordinary influx of passengers was no defence, but the company were bound to provide sufficient accommodations at or within a reasonable time after the hour advertised for all excursion ticket holders. In arguing to set aside the verdict for the plaintiff, rendered under these rulings, the counsel for the defendants said: "Could the company be sued if they had refused to carry a passenger when there was no room for him? They were common carriers, and bound to carry safely." Thereupon, Patteson, J., remarked: "They should have made it a condition of their contract that they would not carry unless there was room." The court refused to grant a new trial. Patteson, J., said: "The defendants, in refusing to take the plaintiff by the morning train, were right, because the train was too full to allow him to be carried with safety. But if they put him off and kept him until the evening, they should have made some special provision for carrying him on to Barnsley at once. I do not think that they had any right to keep him in London until the 9.15 evening train. They should have sent another train. The case finds that they might have done so without danger." Wightman, J., said: " . . . . . I think that by going by the evening train he has waived any right to complain of having been kept until the evening. But if he was content to wait and go by the evening train, he ought to have been carried on as far as Barnsley, unless they had told him what the state of the case was with respect to the stopping at Doncaster, or had made some special terms with him."

In that case it is clear that the company were liable, at all events, for failing to make any attempt to carry the plaintiff through to Barnsley by the evening train. Wightman, J., rests his decision entirely on this, and

it is questionable whether the case can be regarded as an authority for anything beyond this. The county judge at the trial seems to have ruled that the defendants complied with their contract if they carried the plaintiff within a reasonable time after the hour advertised. This is all that the defendants can ask in the case at bar. It means "reasonable under all the circumstances of the case;" and such a ruling is inconsistent with the theory of an absolute guaranty of punctuality. The *dictum*, and the decision of Patteson, J., may be susceptible of the construction that the company had failed to use due foresight to anticipate and provide for the emergency, and that they were liable on that ground. We think that the case cannot be regarded as an authority entitled to controlling weight in the present instance (see 2 Redf. on Railways, 5th ed. p. 281); and we have stated it thus fully, not so much by reason of its intrinsic importance, as on account of the frequency with which it has been cited elsewhere.

Other cases will be noticed more briefly. In *Sears* v. *Eastern R. R. Co.* 14 Allen, 433, the company were liable for not using due care to give notice of the change in the starting time of the train. In *Lafayette R. R. Co.* v. *Sims*, 27 Ind. 59, the company did not attempt to show that they had used due care to provide accommodations. They demurred to the replication, instead of rejoining that there was an unexpected rush of passengers which they could not reasonably have anticipated. *Dunlop* v. *Edin. & Glasg. R. Co.* 16 Jurist, part 2, 407, 408, was a case where the company were clearly in fault. In *Denton* v. *Great Northern R. Co.* 5 El. & Bl. 860, the defendants were liable for falsely representing that a train would start when they knew it would not. There was no attempt on their part to comply with the advertisement. *Weed* v. *Panama R. R. Co.* 17 N. Y. 362, is a case where the delay was held chargeable to the fault of the defendants, on the principle that the act of their servant was their act; see, also, *Blackstock* v. *N. Y. & Erie R. R.* 20 N. Y. 48. In *Deming* v. *Grand Trunk R. R. Co.* 48 N. H. 455, it appeared that, on February 21, the plaintiffs told the defendants that they had wool to send to Boston, which had been contracted for and which they were very anxious to have go forward immediately, and that, unless it could be sent forward from Northumberland the next day, it must go by another railroad route. The defendants thereupon received the wool, and agreed to forward it from Northumberland on February 22, but did *not* forward it until March 16. The defendants offered to show that, owing to the approaching termination of the reciprocity treaty, there was at this time a great and unusual rush of freight, and that this occasioned the delay. They did not offer to prove that the rush commenced after the making of their contract with the plaintiffs, or that the plaintiffs had knowledge of it. The evidence was rejected. (See the ruling on p. 461.) That case differs from the present in at least two vital particulars: First, the special stress laid on punctuality in the negotiation tended to show an absolute contract to carry within a prescribed time, and the jury found such a contract. See *Harmony* v. *Bingham*, 12 N. Y. 99; *Wilson* v. *York, Newcastle & Berwick R. Co.* 18 Eng. Law & Eq. 557, in note; Mullin, J., in *Van Buskirk* v. *Roberts*, 31 N. Y. 661, pp. 674, 675. Second, the existence of the alleged cause of delay was, for aught that appeared, fully

within the knowledge of the defendants at the time they contracted with the plaintiffs. They were in fault for knowingly undertaking more than they could perform. See 17 Mo. 290. In *New Orleans, &c. R. Co.* v. *Hurst*, 36 Miss. 660, the company offered no excuse whatever for running past the station; and in *Heirn* v. *M'Caughan*, 32 Miss. 17, there was evidence tending to show want of due effort to stop. In *Strohn* v. *Detroit & Mil. R. R. Co.* 23 Wis. 126, it seems to have been held that a mere statement by the carrier's agent that the ordinary time for transportation of freight is a certain number of days, is not sufficient to show a contract to carry within that time. In Angell on Carriers, 4th ed. sec. 527 *a*, it is said that the time-tables are "in the nature of a special contract, so that any deviation from them renders the company liable;" but we think no authority there cited, unless it be *Hawcroft* v. *G. W. R. Co.*, directly sustains this position.

It would seem that the English railway companies are now in the habit of inserting notices in their time-tables that they do not warrant that the trains will arrive and depart at the precise time indicated. See Bovill, C. J., in *Lord* v. *Midland R. Co.*, L. R. 2 C. P. 339, p. 345; *Hurst* v. *Great Western R. Co.* 19 C. B. (N. S.) 310; *Prevost* v. *Great Eastern R.* 13 Law Times, N. S. 20; *Buckmaster* v. *G. E. R. Co.* 23 Law Times, N. S. 471. But this practice may have been adopted from abundant caution, and does not seem to us to furnish decisive evidence of the understanding of the legal profession that the time-table, without the notice, would import a warranty. In this country nearly all the railroads publish time-tables, and delays, not attributable to negligence, are not uncommon; yet suits to recover damages for detention in such cases are almost, if not quite, unknown. That such actions are almost unprecedented, "shows very strongly what has been understood to be the law upon the subject."

The motion for a nonsuit was properly denied; for the jury might have found negligence from the (then) unexplained evidence that the train ran by Salem. The new trial is granted, because of the rejection of the evidence which the defendants offered to explain this circumstance.

Verdict set aside.

COURT OF APPEALS OF KENTUCKY.

OCTOBER, 1873.

LIABILITY OF DIRECTORS OF BANK FOR SPECIAL DEPOSIT WRONGFULLY CONVERTED. — NATURE OF SPECIAL DEPOSIT. — NEGLIGENCE.

UNITED SOCIETY OF SHAKERS v. *UNDERWOOD.*
DAVENPORT v. *THE SAME.*

To render the directors of a bank liable for a special deposit wrongfully converted and used by the bank, it is only necessary to show that, but for their gross inattention, a knowledge of the conversion must have been brought to the notice of the directors. Actual knowledge is not necessary.

A special deposit is neither more nor less than a naked bailment.

The opinion of the court was delivered by

LINDSAY, J. The first named appeal is prosecuted from the judgment of the Franklin circuit court, and the latter from that of the Warren court of common pleas; but as the questions involved are almost identical, they will, for convenience, be considered and determined together.

To each of the petitions a general demurrer was sustained, and the parties failing to plead further, judgments were rendered dismissing them absolutely, and we are now called upon to determine whether said petitions set out facts constituting causes of action.

From them it appears that in the year 1865 the Bank of Bowling Green went into operation under a charter approved June 2, 1865, and that during the time it continued in business the defendants were members of its board of directors; and further, that before the institution of these actions said bank, upon the petition of the defendants, or some of them, had been declared a bankrupt by proper legal proceedings, and was insolvent.

The Society of Shakers allege that on the 22d of February, 1869, its agent, U. E. Johns, deposited with the bank a special deposit of $72,450 in bonds, fully described in a memorandum incorporated into the petition, and that the bank had failed upon demand to return $55,660.40 of said bonds. Also that it had failed to account for $9,702.63 collected on interest coupons attached thereto.

Davenport alleges that on the 3d of March, 1866, he placed in the bank on special deposit nine Warren county bonds of $1,000 each, which, by reason of the premium for which they would sell in the market, were of the value of $11,500, and that the bank had failed upon demand to return all or any of such bonds. The Society of Shakers charge the conversion of their bonds in the following language:

"Plaintiffs state that all the aforementioned bonds, aggregating in value the sum of $55,660.40, were wrongfully taken from plaintiffs' package of special deposit by the officers of the Bank of Bowling Green, and by them converted to the use and emolument of said bank by sale as aforesaid, without right or authority from these plaintiffs or any of them, and of such wrongful conversion and appropriation defendants, and each of them had, or could have had, by the most ordinary diligence and investigation, ample notice."

Davenport alleges that his bonds had been "wrongfully appropriated by said Bank of Bowling Green, and converted to the use and emolument of said bank, forwarded to its regular correspondents and by them sold, and the proceeds of sale credited to the Bank of Bowling Green and paid on checks or drafts of said bank, of all of which defendants, and each of them, had notice, as well from the ledgers, books, and accounts of said bank as from its correspondents, reconcilements, and statements."

And further: "That said bonds were wrongfully appropriated as afore said to the use and benefit of said bank, and without authority from this plaintiff, and that of such wrongful conversion and appropriation defendants, and each of them, had or could have had, by the most ordinary diligence, ample notice."

It is also substantially charged in each petition that the defendants, acting as directors, "did, on various occasions, declare dividends when the

condition of the bank did not justify the same, and so appropriated to themselves, they being the largest stockholders, large sums of money actually realized from the conversion of the plaintiffs' property as aforesaid." Upon the facts as thus stated, this court must determine whether or not appellees or any of them are personally bound to make good the losses resulting to appellants from the unauthorized and wrongful conversion by the bank of their special deposits. In the adjudication of these causes, it is not necessary that we should critically inquire into the duties and obligations resting upon the bank directors to look after and protect the interest of special depositors from whom the corporation represented by the directory receives no compensation. It is sufficient to say that special deposits are mere naked bailments, and that the bank, nor its directory, undertake to exercise any greater care in their preservation than the depositor has the reasonable right to suppose is exercised in keeping the bank's property of like description. It cannot be doubted, however, that if the deposit is lost by reason of the gross negligence, or the wilful inattention of the directors, the bank is responsible therefor, upon the well established doctrine that a mere depositary is liable for gross negligence. And as the directory is the corporate government of the bank, and in the legal sense is the corporation itself, the negligence or inattention of its members can and ought to be imputed to the bank. But the liability of the bank in these actions is not made to turn alone upon the want of fidelity and care upon the part of the directory.

It is distinctly and clearly charged that the deposits were sold by the officers of the bank, and the proceeds of such sales converted to its use and emolument, and that this was done with the knowledge of the directors.

This charge implies a conversion by the bailee of the bailors' goods, for which by the common law rules of pleading the bailors might maintain trover.

The question presenting itself in these actions is, whether the directors, who had knowledge of these alleged wrongful sales, are personally liable for the value of the deposits so converted? It is insisted by the appellees that these actions cannot be maintained, because of the want of privity between the depositors and the bank directors. They concede that if they have been guilty of gross mismanagement of the affairs of the bank, and that its insolvency and bankruptcy are the consequence of such mismanagement, they may be held to account to the corporation whose officers and agents they were; but urge that inasmuch as their undertaking was to the bank, they can only be proceeded against by it, the party with whom they contracted, and that these appellants must look to the corporation and not to them.

This assumption is plausible, but it cannot be supported.

Bank directors are not mere agents like cashiers, tellers, and clerks. They are, in a certain sense, trustees for the stockholders; and as to mere dealing with the bank they not only represent it, but for all legal consideration are in fact the bank itself. Morse on Banking, page 76.

Their contract is not alone with the bank. They invite the public to deal with the corporation, and when any one accepts their invitation he has the right to expect reasonable diligence and good faith at their hands;

and if they fail in either, they violate a duty they owe not only to the stockholders but to the creditors and patrons of the corporation. *Hodges* v. *New England Screw Company*, 1 Rhode Island, 312.

An honest administration of the affairs of the bank, and slight diligence at least in preventing special deposits from being wrongfully converted to its use, were legal duties which the directors were under obligation to the special depositors to perform; and as these obligations grew out of their implied contract that they would perform such duties, there is a legal privity between the parties. This doctrine was recognized by this court in the case of *Lexington and Ohio Road Co.* v. *Bridges*, 7 B. Monroe, 556; in which case it was held that the directors of that corporation, by accepting their positions, assumed the discharge of certain duties not only to the company, but to persons dealing with it, and that if they misappropriated the funds intrusted to their control, and a creditor was damaged by the act, he had a right of action against them for the injury resulting from their illegal conduct. Whenever there exists a legal duty to perform or omit to do an act, the law will imply a promise by the person upon whom the duty rests that he will discharge it, and between him and all persons having the legal right to demand its performance a privity of contract exists. Chitty on Contracts, page 1.

These actions, however, are not based upon the contract of bailment to the bank, nor upon the implied contract of the appellants that they would not by gross negligence or tacit acquiescence permit the deposits to be converted to the bank's use. The appellants had the right to elect whether they would avail themselves of the remedies prescribed by law for the breach of contract, either upon the part of the bank or of these appellees; and they have elected to waive their right of action upon these contracts, and sue for the joint tort of the bank and the appellees, committed by the wrongful and unauthorized conversion of their deposits. Treating the bank as the bailee, and the directors as its mere agents, it is perfectly clear that, if they permitted the subordinate officers to sell the special deposits, and then, acting for the bank, assented to the money arising therefrom being used for the purpose of the bank, they are parties to the tort.

"To maintain trover, the defendant must have converted the property to his own use, or have done some other act with a *wrongful intent*, expressed or implied." Hilliard on Torts, section 8, chapter 16, Vol. I. p. 484 (2d edition).

"If one person dispose of the goods of another for the benefit of a third person, this is a conversion." Bacon's Abridgment, title Trover, sub. B.

"Every unlawful intermeddling with the goods of another is a conversion, it being a disposition *pro tanto* of the goods of another as if they were the goods of the intermeddler." Ibid.; also *Young* v. *Moore*, 7 J. J. Marshall, 646.

In the well-considered case of *Pool* v. *Adkisson et al.* 1 Dana, 110, it was held that the agent who disposed of the slaves of another in obedience to the instructions of his employer, acting in good faith and ignorant of the complainant's rights, was nevertheless liable to the true owner; and in the learned dissenting opinion it was not argued that his liability would have been an open question if he had acted in the matter with

knowledge of the fact that the slaves were the property of the party suing and not of his employer.

These appellants allege that their bonds were sold by the officers of the bank and the proceeds paid out in the satisfaction of claims against it, and in the payment of dividends to its stockholders, and that of all this appellees had notice.

Having such notice, it was their duty (and they had full power in the premises) either to prevent the sale of the deposits or to hold the proceeds for the benefit of their owners. Their failure to discharge this duty must be regarded as wilful; and the conclusion cannot be escaped that by permitting the sales to be made, and the proceeds to be paid out as alleged, they made themselves parties to the unauthorized acts constituting the conversion.

This conclusion is strengthened by the averment that they declared dividends when the condition of the bank did not justify it, and thus distributed to themselves portions of the moneys arising from the conversion of appellants' deposits. If such be the case, and they acted with notice of the wrongful sales, they not only participated in but derived profit from the tortious conduct of the subordinate officers of the bank.

It is objected that the allegation of notice is so far qualified as to destroy the sufficiency of the averment. It is alleged that the appellees, "and each of them, had, *or could have had, by the most ordinary diligence and investigation, ample notice.*"

It is certainly the duty of bank directors to use ordinary diligence to acquaint themselves with the business of the corporation, and whatever information might be acquired by ordinary attention to their duties, they must in controversies with persons doing business with the bank be presumed to have. Public policy demands that they shall not be heard to say, that by reason of their gross negligence and wilful inattention they were not apprised of that which the ledgers, books, accounts, correspondence, reconcilements, and statements of the bank showed to be true. It is not necessary in actions like these to bring home to the directors actual knowledge of the fact that the special deposits held by the bank were being sold and converted to its use by the officers having them in custody. It must suffice to show that the evidences of the practice were such that it must have been brought to their knowledge unless they were grossly or wilfully careless in the performance of their duties.

It is further insisted in the case of the United Shakers that it is manifest that all the defendants are not liable, and that by reason of the misjoinder of parties defendant, the general demurrer was properly sustained.

An examination of section 120 of the Civil Code of Practice will show that the improper joinder of parties defendant is not a ground for general demurrer, and under the 144th section of the New York Code, which is similar to section 120 of our own, the courts of that State have so held. *The People* v. *Mayor of New York*, 28 Barbour, 240. The objection may be made available either by a rule requiring the appellant to elect which of the defendants it will proceed against, or by proper instructions by the court, when the cause goes to the jury.

The case of *Hawkins* v. *Phythian*, 8 B. Monroe, 515, does not authorize the deduction that, because there is a different and higher degree of dili-

gence required of the president than of the other directors of the bank, they cannot be jointly sued in these actions. In the case cited the declaration did not show that the injury complained of resulted from the joint act of the defendants, as is alleged in these cases.

The judgments sustaining the general demurrers and dismissing the two petitions must be reversed.

SUPREME COURT OF THE UNITED STATES.

[December, 1873.]

COMMON CARRIER. — RULE AS TO STIPULATION FOR EXEMPTION FROM NEGLIGENCE. — DROVER TRAVELLING ON PASS ON STOCK TRAIN.

N. Y. C. R. R. v. *LOCKWOOD.*

Held: That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable.

That it is not just and reasonable for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

That a drover travelling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

Mr. Justice Bradley delivered the opinion of the court.

The plaintiff in this case was a drover, injured whilst travelling on a stock train of the defendants, proceeding from Buffalo to Albany, and the suit was brought to recover damages for the injury. He had cattle in the train, and had been required, at Buffalo, to sign an agreement to attend to the loading, transporting, and unloading of his cattle, and to take all risk of injury to them and of personal injury to himself or whoever went with the cattle; and received what is called a drover's pass — certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of the plaintiff's cattle at less than tariff rates. It was shown on the trial, that these rates were about three times the ordinary rates charged, and that no drover had cattle carried on those terms; but all signed similar agreements to that which was signed by the plaintiff, and received similar passes. Evidence was given on the trial tending to show that the injury complained of was sustained in consequence of negligence on the part of the defendants or their servants, but they insisted that they were exempted by the terms of the contract from responsibility for all accidents, including those occurring from negligence, at least the ordinary negligence of their servants; and requested the judge so to charge. This he refused, and charged that if the jury were satisfied that the injury occurred without any negligence on the part of the plain-

tiff, and that the negligence of the defendants caused the injury, they must find for the plaintiff, which they did.

It is unnecessary to notice the subordinate points made, as we are of opinion that all the questions of fact were fairly left to the jury, and that the whole controversy depended on this main question of law.

It may be assumed *in limine*, that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage.

As the duties and responsibilities of public carriers were prescribed by public policy, it has been seriously doubted whether the courts did wisely in allowing that policy to be departed from without legislative interference, by which needed modifications could have been introduced into the law. But the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened by sheer accident without any possibility of fraud or collusion on his part, such as by collisions at sea, accidental fire, &c., led to a relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill of lading, or other contract of carriage. A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation; thus proportionately relieving the transportation of produce and merchandise from some of the burdens with which it is loaded.

The question is, whether such modification of responsibility by notice or special contract may not be carried beyond legitimate bounds, and introduce evils against which it was the direct policy of the law to guard; whether, for example, a modification which gives license and immunity to negligence and carelessness on the part of a public carrier or his servants, is not so evidently repugnant to that policy as to be altogether null and void; or, at least null and void under certain circumstances.

In the case of sea-going vessels, Congress has, by the act of 1851, relieved ship-owners from all responsibility for loss by fire, unless caused by their own design or neglect; and from responsibility for loss of money and other valuables named, unless notified of their character and value; and has limited their liability to the value of the ship and freight, where losses happen by the embezzlement or other act of the master, crew, or passengers; or by collision, or any cause occurring without their privity or knowledge; but the master and crew themselves are held responsible to the parties injured by their negligence or misconduct. Similar enactments have been made by state legislatures. This seems to be the only important modification of previously existing law on the subject, which in this country has been effected by legislative interference. And by this it is seen, that though intended for the relief of the ship-owner, it still leaves him liable to the extent of his ship and freight for the negligence and misconduct of his employés, and liable without limit for his own negligence.

It is true that the first section of the above act relating to loss by fire has a proviso, that nothing in the act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners. This proviso, however, neither enacts nor affirms anything. It simply expresses the intent of Congress to leave the right of contracting as it stood before the act.

The courts of New York, where this case arose, for a long time resisted the attempts of common carriers to limit their common law liability, except for the purpose of procuring a disclosure of the character and value of articles liable to extra hazard and risk. This they were allowed to enforce by means of a notice of non-liability if the disclosure was not made. But such announcements as "all baggage at the risk of the owner," and such exceptions in bills of lading as "this company will not be responsible for injuries by fire, nor for goods lost, stolen, or damaged," were held to be unavailing and void, as being against the policy of the law. *Cole* v. *Goodwin*, 19 Wend. 257; *Gould* v. *Hill*, 2 Hill, 623.

But since the decision in the case of *The New Jersey Steam Navigation Company* v. *Merchants' Bank*, by this court, in January term, 1848 (6 How. 344), it has been uniformly held, as well in the courts of New York as in the federal courts, that a common carrier may, by special contract, limit his common law liability, although considerable diversity of opinion has existed as to the extent to which such limitation is admissible.

The case of *The New Jersey Steam Navigation Company* v. *Merchants' Bank*, above adverted to, grew out of the burning of the steamer Lexington. Certain money belonging to the bank had been intrusted to Harnden's Express, to be carried to Boston, and was on board the steamer when she was destroyed. By agreement between the steamboat company and Harnden, the crate of the latter and its contents were to be at his sole risk. The court held this agreement valid, so far as to exonerate the steamboat company from the responsibility imposed by law; but not to excuse them for misconduct or negligence, which the court said it would not presume that the parties intended to include, although the terms of the contract were broad enough for that purpose; and that inasmuch as the company had undertaken to carry the goods from one place to another, they were deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and were, therefore, bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation; and as the court was of opinion that the steamboat company had been guilty of negligence in these particulars, as well as in the management of the steamer during the fire, they held them responsible for the loss.

As this has been regarded as a leading case, we may pause for a moment to observe that the case before us seems almost precisely within the category of that decision. In that case, as in this, the contract was general, exempting the carrier from every risk and imposing it all upon the party; but the court would not presume that the parties intended to include the negligence of the carrier or his agents in that exception.

It is strenuously insisted, however, that as negligence is the only ground of liability in the carriage of passengers, and as the contract is absolute

in its terms, it must be construed to embrace negligence as well as accident, the former in reference to passengers, and both in reference to the cattle carried in the train. As this argument seems plausible, and the exclusion of a liability embraced in the terms of exemption on the ground that it could not have been in the mind of the parties is somewhat arbitrary, we will proceed to examine the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence. In doing so we shall first briefly review the course of decisions in New York, on which great stress has been laid, and which are claimed to be decisive of the question. Whilst we cannot concede this, it is, nevertheless, due to the courts of that State to examine carefully the grounds of their decision, and to give them the weight which they justly deserve. We think it will be found, however, that the weight of opinion, even in New York, is not altogether on the side that favors the right of the carrier to stipulate for exemption from the consequences of his own or his servants' negligence.

The first recorded case that arose in New York, after the before-mentioned decision in this court, involving the right of a carrier to limit his liability, was that of *Dorr* v. *The New Jersey Steam Navigation Company*, decided in 1850 (4 Sandf. 136). This case also arose out of the burning of the Lexington, under a bill of lading which excepted from the company's risk "danger of fire, water, breakage, leakage, and other accidents." Judge Campbell, delivering the opinion of the court, says: "A common carrier has in truth two distinct liabilities: the one for losses by accident or mistake, where he is liable as an insurer; the other for losses by default or negligence, where he is answerable as an ordinary bailee. It would certainly seem reasonable that he might, by express special contract, restrict his liability as insurer; that he might protect himself against misfortune, even though public policy should require that he should not be permitted to stipulate for impunity where the loss occurs from his own default or neglect of duty. Such we understand to be the doctrine laid down in the case of *The New Jersey Steam Navigation Co.* v. *The Merchants' Bank*, in 6 Howard, and such we consider to be the law in the present case." And in *Stoddard* v. *Long Island R. Co.* (5 Sandf. 180), another express case, in which it was stipulated that the express company should be alone responsible for all losses, Judge Duer, for the court, says: "Conforming our decision to that of the supreme court of the United States, we must, therefore, hold: 1. That the liability of the defendants as common carriers was restricted by the terms of the special agreement between them and Adams & Co., and that this restriction was valid in law. 2. That by the just interpretation of this agreement the defendants were not to be exonerated from all losses, but remained liable for such as might result from the wrongful acts, or the want of due care and diligence of themselves or their agents and servants. 3. That the plaintiffs, claiming through Adams & Co., are bound by the special agreement." The same view was taken in subsequent cases (*Parsons* v. *Monteath*, 13 Barb. 353; *Moore* v. *Evans*, 14 Barb. 524), all of which show that no idea was then entertained of sanctioning exemptions of liability for negligence.

It was not till 1858, in the case of *Welles* v. *N. Y. Cent. R. Co.* 26

Barb. 641, that the supreme court was brought to assent to the proposition that a common carrier may stipulate against responsibility for the negligence of his servants. That was the case of a gratuitous passenger travelling on a free ticket, which exempted the company from liability. In 1862, the court of appeals, by a majority, affirmed this judgment (24 N. Y. 181), and in answer to the suggestion that public policy required that railroad companies should not be exonerated from the duty of carefulness in performing their important and hazardous duties, the court held that the case of free passengers could not seriously affect the incentives to carefulness, because there were very few such, compared with the great mass of the travelling public. *Perkins* v. *N. Y. Cent. R. Co.* 24 N. Y. 196, was also the case of a free passenger, with a similar ticket, and the court held that the indorsement exempted the company from all kinds of negligence of its agents, gross as well as ordinary; that there is, in truth, no practical distinction in the degrees of negligence.

The next cases of importance that arose in the New York courts were those of *drovers' passes*, in which the passenger took all responsibility of injury to himself and stock. The first was that of *Smith* v. *N. Y. Cent. R. R. Co.* 29 Barb. 132, decided in March, 1859. The contract was precisely the same as that in the present case. The damage arose from a flattened wheel in the car which caused it to jump the track. The supreme court, by Hogeboom, J., held that the railroad company was liable for any injury happening to the passenger, not only by the gross negligence of the company's servants, but by ordinary negligence on their part. "For my part," says the judge, "I think not only gross negligence is not protected by the terms of the contract, but what is termed ordinary negligence, or the withholding of ordinary care, is not so protected. I think, notwithstanding the contract, the carrier is responsible for what, independent of any peculiar responsibility attached to his calling or employment, would be regarded as fault or misconduct on his part." The judge added that he thought the carrier might, by positive stipulation, relieve himself to a limited degree from the consequences of his own negligence or that of his servants. But, to accomplish that object, the contract must be clear and specific in its terms, and plainly covering such a case. Of course, this remark was extrajudicial. The judgment itself was affirmed by the court of appeals in 1862 by a vote of five judges to three. 24 N. Y. 222. Judge Wright strenuously contended that it is against public policy for a carrier of passengers, where human life is at stake, to stipulate for immunity for any want of care. "Contracts in restraint of trade are void," he says, "because they interfere with the welfare and convenience of the state; yet the state has a deep interest in protecting the lives of its citizens." He argued that it was a question affecting the public, and not alone the party who is carried. Judge Sutherland agreed in substance with Judge Wright. Two other judges held that if the party injured had been a gratuitous passenger the company would have been discharged, but in their view he was not a gratuitous passenger. One judge was for affirmance, on the ground that the negligence was that of the company itself. The remaining three judges held the contract valid to the utmost extent of exonerating the company, notwithstanding the grossest neglect on the part of its servants.

In that case, as in the one before us, the contract was general in its terms, and did not specify negligence of agents as a risk assumed by the passenger, though by its generality it included all risks.

The next case, *Bissell* v. *The N. Y. Cent. R. R. Co.* 29 Barb. 602, first decided in September, 1859, differed from the preceding in that the ticket expressly stipulated that the railroad company should not be liable under any circumstances, "whether of negligence by their agents, or otherwise," for injury to the person or stock of the passenger. The latter was killed by the express train running into the stock train, and the jury found that his death was caused by the gross negligence of the agents and servants of the defendants. The supreme court held that gross negligence (whether of servants or principals) cannot be excused by contract in reference to the carriage of passengers for hire, and that such a contract is against the policy of the law, and void. In December, 1862, this judgment was reversed by the court of appeals, four judges against three. 25 N. Y. Rep. 442. Judge Smith, who concurred in the judgment below, having in the mean time changed his views as to the materiality of the fact that the negligence stipulated against was that of the servants of the company, and not of the company itself. The majority now held that the ticket was a free ticket, as it purported to be, and, therefore, that the case was governed by *Wells* v. *The Central Railroad Co.*; but whether so, or not, the contract was founded on a valid consideration, and the passenger was bound to it, even to the assumption of the risk arising from the gross negligence of the company's servants. Elaborate opinions were read by Justice Selden in favor, and by Justice Denio against the conclusions reached by the court. The former considered that no rule of public policy forbids such contracts, because the public is amply protected by the right of every one to decline any special contract, on paying the regular fare prescribed by law, — that is the highest amount which the law allows the company to charge. In other words, unless a man chooses to pay the highest amount which the company by its charter is authorized to charge, he must submit to their terms, however onerous. Justice Denio, with much force of argument, combated this view, and insisted upon the impolicy and immorality of contracts stipulating immunity for negligence, either of servants or principals, where the lives and safety of passengers are concerned. The late case of *Poucher* v. *N. Y. Cent. R. Co.* 49 N. Y. 263, is in all essential respects a similar case to this, and a similar result was reached.

These are the authorities which we are asked to follow. Cases may also be found in some of the other state courts, which, by dicta or decision, either favor or follow more or less closely, the decisions in New York. A reference to the principal of these is all that is necessary here: *Ashmore* v. *Penn. R. Co.* 4 Dutch. 180; *Kinney* v. *Cent. R. Co.* 3 Vroom, 407; *Hale* v. *N. J. St. Nav. Co.* 15 Conn. 539; *Peck* v. *Weeks*, 34 Conn. 145; *Lawrence* v. *N. Y. R. Co.* 36 Conn. 63; *Kimball* v. *Rutland R. Co.* 26 Vt. 247; *Mann* v. *Birchard*, 40 Vt. 332; *Adams Exp. Co.* v. *Haynes*, 42 Ill. 89; Ibid. 458; *Ill. Cent. R. Co.* v. *Adams Exp. Co.* Ibid. 474; *Hawkins* v. *Great West. R. Co.* 17 Mich. 57; *S. C.* 18 Mich. 427; *Balt. & O. R. Co. v. Brady*, 32 Md. 333; 25 Md. 328; *Levering* v. *Union Transportation Co.* 42 Mo. 88.

A review of the cases decided by the courts of New York shows that though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms. So that if we only felt bound by those precedents, we could, perhaps, find no authority for reversing the judgment in this case. But on a question of general commercial law, the federal courts administering justice in New York have equal and coördinate jurisdiction with the courts of that State. And in deciding a case which involves a question of such importance to the whole country, a question on which the courts of New York have expressed such diverse views, and have so recently and with such slight preponderancy of judicial suffrage, come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law.

In passing, however, it is apposite to call attention to the testimony of an authoritative witness as to the operation and effect of the recent decisions referred to. "The fruits of this rule," says Justice Davis, "are already being gathered in increasing accidents, through the decreasing care and vigilance on the part of these corporations; and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts." *Stinson* v. *N. Y. Central R. Co.* 32 N. Y. Rep. 337.

We now proceed to notice some cases decided in other states, in which a different view of the subject is taken.

In Pennsylvania, it is settled by a long course of decisions, that a common carrier cannot, by notice or special contract, limit his liability so as to exonerate him from responsibility for his own negligence or misfeasance, or that of his servants and agents. *Laing* v. *Colder*, 8 Barr, 479; *Camden & Amboy R. Co.* v. *Baldauf*, 16 Penn. 67; *Goldey* v. *Pennsylvania R. Co.* 30 Penn. 242; *Powell* v. *Penn. R. Co.* 32 Penn. 414; *Penn. R. Co.* v. *Henderson*, 51 Penn. 315; *Farnham* v. *Camden & Amboy R. Co.* 55 Penn. 53; *Express Co.* v. *Sands*, Ibid. 140; *Empire Trans. Co.* v. *Wamsutta Oil Co.* 63 Penn. 14. "The doctrine is firmly settled," says Chief Justice Thompson, in *Farnham* v. *C. & A. R. Co.* "that a common carrier cannot limit his liability so as to cover his own or his servants' negligence." 55 Penn. 62. This liability is affirmed both when the exemption stipulated for is general, covering all risks, and where it specifically includes damages arising from the negligence of the carrier or his servants. In *Penn. R. Co.* v. *Henderson*, a drover's pass stipulated for immunity of the company in case of injury from negligence of its agents, or otherwise. The court, Judge Read delivering the opinion, after a careful review of the Pennsylvania decisions, says: "This indorsement relieves the company from all liability for any cause whatever, for any loss or injury to the person or property, however it may be occasioned; and our doctrine, settled by the above decisions, made upon grave deliberation, declares that such a release is no excuse for negligence."

The Ohio cases are very decided on this subject, and reject all attempts of the carrier to excuse his own negligence or that of his servants. *Jones*

v. *Voorhees*, 10 Ohio, 145: *Davidson* v. *Graham*, 2 Ohio St. R. 131: *Graham* v. *Davis*, 4 Ohio St. 362: *Wilcox* v. *Hamilton*, Ibid. 722: *Welsh* v. *Pittsburg, Ft. W. & Chicago R.* 10 Ibid. 65: *Cent. and R.* v. *Curran*, 19 Ibid. 1; *Cincinnati, &c. R.* v. *Peatins*, Ibid. 221: *Kinnistan* v. *Erie R.* Ibid. 240. In *Davidson* v. *Graham*, the court, after conceding the right of the carrier to make special contracts to a certain extent, says: "He cannot, however, protect himself from losses occasioned by his own fault. He exercises a public employment, and diligence and good faith in the discharge of his duties are essential to the public interests. . . . . And public policy forbids that he should be relieved by special agreement from that degree of diligence and fidelity which the law has exacted in the discharge of his duties." In *Welsh* v. *P., Ft. W. & Chicago R.* the court says: "In this State, at least, railroad companies are rapidly becoming almost the exclusive carriers both of passengers and goods. In consequence of the public character and agency which they have voluntarily assumed, the most important powers and privileges have been granted to them by the State." From these facts the court reasons that it is specially important that railroad companies should be held to the exercise of due diligence at least. And as to the distinction taken by some, that negligence of servants may be stipulated for, the court pertinently says: "This doctrine, when applied to a corporation which can only act through its agents and servants, would secure complete immunity for the neglect of every duty." Pp. 75, 76. And in relation to a drover's pass, substantially the same as that in the present case, the same court, in *Cleveland &c. R.* v. *Curran*, 19 Ohio St. 1, *held*: 1. That the holder was not a gratuitous passenger. 2. That the contract constituted no defence against the negligence of the company's servants, being against the policy of the law, and void. The court refers to the cases of *Bissell* v. *The New York Central R.* 25 N. Y. 442; and of *Penn. R.* v. *Henderson*, 51 Penn. St. R. 315; and expresses its concurrence in the Pennsylvania decision. Pp. 13, 14. This was in December term, 1869.

The Pennsylvania and Ohio decisions differ mainly in this, that the former give to a special contract (when the same is admissible) the effect of converting the common carrier into a special bailee for hire, whose duties are governed by his contract, and against whom, if negligence is charged, it must be proved by the party injured; whilst the latter hold that the character of the carrier is not changed by the contract, but that he is a common carrier still, with enlarged exemptions from responsibility, within which the burden of proof is on him to show that an injury occurs. The effect of this difference is to shift the burden of proof from one party to the other. It is unnecessary to adjudicate that point in this case, as the judge on the trial charged the jury, as requested by the defendants, that the burden of proof was on the plaintiff.

In Maine, whilst it is held that a common carrier may, by special contract, be exempted from responsibility for loss occasioned by natural causes, such as the weather, fire heat, frost, &c. (*Fillebrown* v. *Grand Trunk R. Co.* 55 Maine, 462), yet in a case where it was stipulated that a railroad company should be exonerated from all damages that might happen to any horses or cattle that might be sent over the road, and that the owners should take the risk of all such damages, the court held that

the company were not thereby excused from the consequences of their negligence, and that the distinction between negligence and gross negligence in such a case is not tenable. "The very great danger," says the court, "to be anticipated by permitting them" (common carriers) "to enter into contracts to be exempt from losses occasioned by misconduct or negligence, can scarcely be over-estimated. It would remove the principal safeguard for the preservation of life and property in such conveyances." *Sager* v. *Portsmouth*, 31 Maine, 228, 238.

To the same purport it was held in Massachusetts, in the late case of *School District* v. *Boston, &c. Railroad Co.* 102 Mass. 552, where the defendant set up a special contract that certain iron castings were taken at the owner's risk of fracture or injury during the course of transportation, loading, and unloading, and the court say: "The special contract here set up is not alleged, and could not by law be permitted to exempt the defendants from liability for injuries by their own negligence." P. 556.

To the same purport, likewise, are many other decisions of the state courts, as may be seen by referring to the cases, some of which are argued with great force and are worthy of attentive perusal, but, for want of room, can only be referred to here. *Indianapolis R.* v. *Allen*, 31 Ind. 394; *Mich. South. R.* v. *Heaton*, 31 Ind. 397, note; *Flinn* v. *Phil., Wilm. & Balt. R.* 1 Houston's Del. R. 472; *Orndorff* v. *Adams Exp. Co.* 3 Bush, (Ky.) R. 194; *Swindler* v. *Hilliard & Brooks*, 2 Rich. (So. Car.) 286; *Berry* v. *Cooper*, 28 Ga. 543; *Steele* v. *Townsend*, 37 Ala. 247; *Southern Express Co.* v. *Crook*, 44 Ala. 468; *Whitesides* v. *Thurlkill*, 12 Sm. & Mar. 599; *Southern Express Co.* v. *Moon*, 39 Miss. 822; *N. O. Mutual Ins. Co.* v. *Railroad Co.* 20 La. Ann. 302.

These views as to the impolicy of allowing stipulations against liability for negligence and misconduct are in accordance with the early English authorities. St. Germain, in The Doctor and Student, Dial. 2, c. 38, pointedly says of the common carrier: "If he would percase refuse to carry it" (articles delivered for carriage) "unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like."

A century later this passage is quoted by Attorney General Noy in his book of Maxims as unquestioned law. Noy's Max. 92. And so the law undoubtedly stood in England until comparatively a very recent period. Sergeant Stephen, in his Commentaries, vol. 2, p. 135, after stating that a common carrier's liability might, at common law, be varied by contract, adds that the law still held him responsible for negligence and misconduct.

The question arose in England principally upon public notices given by common carriers that they would not be responsible for valuable goods, unless entered and paid for according to value. The courts held that this was a reasonable condition, and if brought home to the owner, amounted to a special contract, valid in law. But it was also held, that it could not exonerate the carrier if a loss occurred by his actual malfeasance or gross negligence. Or, as Starkie says, "Proof of a direct misfeasance or gross negligence is, in effect, an answer to proof of notice." Evid. vol. 2, p.

205, 6th Am. ed. But the term "gross negligence" was so vague and uncertain, that it came to represent every instance of actual negligence of the carrier or his servant, or ordinary negligence in the accustomed mode of speaking. *Hinton* v. *Dibbon*, 2 A. & E. N. Ser. 646; *Wild* v. *Pickford*, 8 M. & W. 460. Justice Story, in his work on Bailments, originally published in 1832, says that it is now held, that in cases of such notices the carrier is liable for losses and injury occasioned not only by gross negligence, but by ordinary negligence; or, in other words, the carrier is bound to ordinary diligence. Story on Bailments, sec. 571.

In estimating the effect of these decisions, it must be remembered that in the cases covered by the notices referred to the exemption claimed was entire, covering all cases of loss, negligence as well as others. They are, therefore, directly in point.

In 1863, in the great case of *Peek* v. *The North Staffordshire Railway Co.* 10 House of Lords Cases, 473, Mr. Justice Blackburn, in the course of a very clear and able review of the law on the subject, after quoting this passage from Justice Story's work, proceeds to say: "In my opinion, the weight of authority was, in 1832, in favor of this view of the law; but the cases decided in our courts between 1832 and 1854 established that this was not the law, and that a carrier might, by a special notice, make a contract limiting his responsibility, even in the cases here mentioned, of gross negligence, misconduct, or fraud on the part of his servants; and, as it seems to me, the reason why the legislature intervened in the railway and canal traffic act, in 1854, was because it thought that the companies took advantage of those decisions (in Story's language) 'to evade altogether the salutary policy of the common law.'"

This quotation is sufficient to show the state of the law in England at the time of the publication of Judge Story's work; and it proves that at that time common carriers could not stipulate for immunity for their own or their servants' negligence. But in the case of *Carr* v. *Lancashire R. Co.* 7 Excheq. R. 707, and other cases decided while the change of opinion alluded to by Justice Blackburn was going on (several of which related to the carriage of horses and cattle), it was held that carriers could stipulate for exemption from liability for even their own gross negligence. Hence the act of 1854 was passed, called the railway and canal traffic act, declaring that railway and canal companies should be liable for negligence of themselves or their servants, notwithstanding any notice or condition, unless the court or judge trying the cause should adjudge the conditions just and reasonable. 1 Fisher's Dig. 1466. Upon this statute ensued a long list of cases deciding what conditions were or were not just and reasonable. The truth is, that this statute did little more than bring back the law to the original position in which it stood before the English courts took their departure from it. But as we shall have occasion to advert to this subject again, we pass it for the present.

It remains to see what has been held by this court on the subject now under consideration.

We have already referred to the leading case of the *N. J. Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 383. On the precise point now under consideration, Justice Nelson said: "If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents,

in the transportation of goods, it should be required to be done, at least in terms that would leave no doubt as to the meaning of the parties."

As to the carriers of passengers, Mr. Justice Grier, in the case of *Philadelphia & Reading R.* v. *Derby*, 14 How. 486, delivering the opinion of the court, said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such a transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" That was the case of a free passenger, a stockholder of the company, taken over the road by the president to examine its condition; and it was contended in argument, that as to him, nothing but "gross negligence" would make the company liable. In the susequent case of *The Steamboat New World* v. *King*, 16 How. 469, which was also the case of a free passenger carried on a steamboat, and injured by the explosion of the boiler, Curtis, Justice, delivering the judgment, quoted the above proposition of Justice Grier, and said: "We desire to be understood to reaffirm that doctrine, as resting not only on public policy, but on sound principles of law." P. 474.

In *York Company* v. *Central Railroad*, 3 Wall. 113, the court, after conceding that the responsibility imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, adds: "When such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement." In the case of *Walker* v. *The Transportation Company*, decided at the same term (3 Wall. 150), it is true, the owner of a vessel destroyed by fire on the lakes was held not to be responsible for the negligence of the officers and agents having charge of the vessel; but that was under the act of 1851, which the court held to apply to our great lakes as well as to the sea. And in *Express Co.* v. *Kountze Brothers*, 8 Wall. 342, where the carriers were sued for the loss of gold-dust delivered to them on a bill of lading excluding liability for any loss or damage by fire, act of God, enemies of the government, or dangers incidental to a time of war, they were held liable for a robbery by a predatory band of armed men (one of the excepted risks), because they negligently and needlessly took a route which was exposed to such incursions. The judge at the trial charged the jury, that although the contract was legally sufficient to restrict the liability of the defendants as common carriers, yet if they were guilty of actual negligence, they were responsible; and that they were chargeable with negligence unless they exercised the care and prudence of a prudent man in his own affairs. This was held by this court to be a correct statement of the law. P. 353.

Some of the above citations are only expressions of opinion, it is true; but they are the expressions of judges whose opinions are entitled to much weight; and the last cited case is a judgment upon the precise point. Taken in connection with the concurring decisions of state courts before cited, they seem to us decisive of the question, and leave but little to be added to the considerations which they suggest.

It is argued that a common carrier, by entering into a special contract

with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and, therefore, may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract.

We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts, also, losses by means of *any* superior force, and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risks of inevitable accidents in the carriage of his goods? Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made; is the company a public carrier as to the twenty parcels, and a private carrier as to the one?

On this point, there are several authorities which support our view, some of which are noted: *Davidson* v. *Graham*, 2 Ohio St. 131; *Graham* v. *Davis & Co.* 4 Ohio St. 362; *Swindler* v. *Hilliard*, 2 Rich. 286; *Baker* v. *Brinson*, 9 Rich. 201; *Steele* v. *Townsend*, 37 Ala. 247.

A common carrier may undoubtedly become a private carrier, or a bailee for hire, when, as a matter of accommodation, or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York city and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character.

But it is contended, that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to

stipulate for immunity for the negligence of his servants, over whose actions in his absence he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties — an object essential to the welfare of every civilized community. Hence the common law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers, the highest degree of carefulness and diligence is expressly exacted. In the one case, the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other, it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment. And to assert that he may do so seems almost a contradiction in terms.

Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business.

To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus in *Dorr* v. *N. J. S. Nav. Co.* 1 Kern. 485, the court sums up its judgment thus: "To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals, or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any

paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And this reason is obvious enough — if they did not accept this, they must pay tariff rates. These rates were seventy cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2,000 pounds, making a charge of $14 for every animal carried, instead of the usual charge of $70 for a car load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary it is to stand firmly by those principles of law by which the public interests are protected.

If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright, and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of

society, and the better administration of the laws had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule that he must be responsible at all events. Hence the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public and stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.

Hence, as before remarked, we regard the English statute, called the railway and canal traffic act, passed in 1854, which declared void all notices and conditions made by common carriers, except such as the judge at the trial, or the courts should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law instead of the individual judges. The decisions made for more than half a century before the courts commenced the normal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect when not made under the fallacious notion that every special contract imposed by the common carrier on his customers must be carried into effect, for the simple reason that it was entered into without regard to the character of the contract and the relative situation of the parties.

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid, so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part, when they asked to go still further, and to be excused from negligence, — an excuse so repugnant to the law of their foundation and to the public good, — they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.

On this subject, the remarks of Chief Justice Redfield, in his recent collection of American Railway Cases, seem to us eminently just. "It being clearly established then," says he, "that common carriers have public duties which they are bound to discharge with impartiality, we must conclude that they cannot, either by notices or special contracts, release themselves from the performance of these public duties, even by the consent of those who employ them; for all extortion is done by the apparent consent of the victim. A public officer or servant, who has a monopoly in his department, has no just right to impose onerous and unreasonable conditions upon those who are compelled to employ him." And his conclusion is, that, notwithstanding some exceptional decisions, the law of to-day stands substantially as follows: "1. That the exemption claimed by carriers must be reasonable and just, otherwise it will be regarded as extorted from the owners of the goods by duress of circumstances, and,

therefore, not binding. 2. That every attempt of carriers, by general notices or special contract, to excuse themselves from responsibility for losses or damages resulting in any degree from their own want of care and faithfulness, is against that good faith which the law requires as the basis of all contracts or employments, and, therefore, based upon principles and a policy which the law will not uphold."

The defendants endeavor to make a distinction between gross and ordinary negligence, and insist that the judge ought to have charged that the contract was at least effective for excusing the latter.

We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party, and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply "negligence." And this seems to be the tendency of modern authorities. 1 Smith's Lead. Cases, 6th Amer. ed.; Story on Bailments, § 571; *Wyld* v. *Pickford*, 8 M. & W. 443; *Hinton* v. *Dibbin*, 2 Q. B. 661; *Wilson* v. *Brett*, 11 M. & W. 115; *Beal* v. *South Devon R. Co.* 3 Hurlst. & Colt, 337; L. R. 1 C. P. 600; 14 How. 486; 16 How. 474. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties, and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that "every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it." Art. 1382. Toullier, in his Commentary on the Code, regards this as a happy thought, and a return to the law of nature. Vol. 6, p. 243. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice.

In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence.

The question whether the company was guilty of negligence in this case, which caused the injury sustained by the plaintiff, was fairly left to the jury. It was unnecessary to tell them whether, in the language of law writers, such negligence would be called gross or ordinary.

The conclusions to which we have come are: —

First. That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law.

Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

Fourthly. That a drover travelling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire.

Judgment affirmed.

SUPREME COURT OF PENNSYLVANIA.

[OCTOBER, 1873.]

NUISANCE DEFINED. — POWDER MAGAZINE.

WEIR v. *KIRK.*

In determining what constitutes a nuisance it is proper that all the circumstances of the case be considered.

The erection of a powder magazine near a public highway, in a growing neighborhood, enjoined, although not in or near a thickly settled neighborhood.

THIS was a bill in equity praying for an injunction to restrain the defendant from erecting and maintaining a powder house or magazine in Indiana township, Allegheny County, Pa., on the line of the Sharpsburg and Kittanning turnpike road, about half a mile north of the borough of Sharpsburg, and near the residences of the complainants. The answer admitted the fact that he was engaged in erecting the powder magazine, &c., but denied that there was any reason to apprehend danger to persons or property from an explosion.

Charles S. Fetterman, Esq., who was appointed master, submitted the following as his conclusions, viz.: —

1. That the magazine in controversy, if erected and maintained, will not be a common nuisance.

2. That the complainants have failed to show, by any means whatever, any grounds upon which to base any reasonable apprehension of danger to themselves, their families, and property, from the present location of the magazine in controversy, or that they have sustained any real, actual damage to or depreciation in the value of their property; or that there is any reasonable apprehension of an explosion of the magazine while being used with reasonable care for the purpose for which it is intended.

John Barton, A. M. Brown & S. Schoyer, Jr., Esqrs., for appellants, cited *Rhodes* v. *Dunbar*, 7 P. F. S. 290, and claimed the rule to be that a powder magazine is a nuisance whenever it is so located as to cause injury to persons and property in case of an explosion.

George Shiras, Jr., J. W. Kirker & Thomas W. Kirker, Esqrs., for appellee, cited *The People* v. *Sands*, 1 Johnson, 78; *Carpenter* v. *Cummings*, 2 Phila. Rep. 74; *Rhodes* v. *Dunbar*, 7 P. F. S. 274; *Richards' Appeal*, 7. P. F. S. 105; *Huckenstine's Appeal*, 20 P. F. S. 102.

The opinion of the court was delivered by

SHARSWOOD, J. The great difficulty in all cases of this character is not in the ascertainment of the true rule of equity, but in the application of that rule to the facts. While it may be easy to draw the line between what is and what is not a nuisance, which equity ought to enjoin, it is by no means so easy to determine whether the circumstances of any particular case ought to place it on one side or the other of that line. It is rare that any number of men will be found to agree in their judgment upon such a question.

One remark, however, may be hazarded, as preliminary to a brief consideration of the circumstances of this case, in which I think all will agree. There are many kinds of business, useful, and even necessary, in every large community, especially where manufacturing is carried on on a large scale, which certainly are not nuisances in themselves, but which nevertheless become so in view of the circumstances of the neighborhood in which it is proposed to establish them. The present Chief Justice, in his opinion at nisi prius, in *Rhodes* v. *Dunbar*, 7 P. F. Smith, 275, enumerates twenty-nine kinds of such useful establishments which have been declared public nuisances.

There is a very marked distinction to be observed in reason and equity between the case of a business long established in a particular locality, which has become a nuisance from the growth of population and the erection of dwellings in proximity to it, and that of a new erection threatened in such a vicinity. Carrying on an offensive trade for any number of years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of which and travellers upon which it is a nuisance. As the city extends, such nuisances should be removed to the vacant grounds beyond the immediate neighborhood of the residence of the citizens. This, public policy, as well as the health and comfort of the population of the city, demand. 7 P. F. Smith, 275. It certainly ought to be a much clearer case, however, to justify a court of equity in stretching forth the strong arm of injunction to compel a man to remove an establishment in which he has invested his capital and been carrying on business for a long period of time, from that of one who comes into a neighborhood proposing to establish such a business for the first time, and who is met at the threshold of his enterprise by a remonstrance and notice that if he persists in his purpose, application will be made to a court of equity to prevent him. In the case before us the defendant occupies this position.

It is not contended that a powder magazine — a building for storing large quantities of gunpowder — in the midst of a thickly settled neigh-

borhood, is not a nuisance. By the act of Assembly of March 20th, 1856, Pamph. L. 137, it is made unlawful for any person or persons to have or keep any quantity of gunpowder or gun-cotton in any house, store, shop, building, cellar, or other place within the city of Philadelphia (except in the public magazines, or in a quantity not exceeding two pounds for private use), unless in the manner provided in the act, which provisions in the main are, that no person shall deal in the article without a license, and if licensed shall not keep on hand more than twenty-five pounds, and shall have a painted sign distinctly legible to all passers by, with the words "licensed to sell gunpowder," and that every carriage for conveying the article shall have painted on each side, in letters distinctly visible to all passers-by, the word "gunpowder." A public magazine has been erected, by the authority of the Commonwealth, near the mouth of the Schuylkill, and a state superintendent appointed, whose fees are regulated by law. Act of May 5th, 1864, Pamph. L. 841. One of the general powers conferred upon boroughs by the act of April 3, 1851, Pamph. L. 320, is "to prohibit within the borough the carrying on of any manufacture, art, trade, or business, which may be noxious or offensive to the inhabitants; the manufacture, sale, or exposure of fire-works, or other inflammable or dangerous articles, and to limit and prescribe the quantities that may be kept in one place of gunpowder, fire-works, turpentine, or other inflammable articles, and to prescribe such safeguards as may be necessary." Thus the legislature has recognized that the storing of gunpowder in large quantities in thickly settled places, is a nuisance to be guarded against by public authority. But it is not confined to cities and boroughs. This court has acknowledged and declared it as a case clearly within the general rule of equity upon this subject, in the opinion of the majority as pronounced by Mr. Chief Justice Thompson, in *Rhodes* v. *Dunbar*, 7 P. F. Smith, 274. After remarking upon the particular character and danger of the establishment which was the subject matter of the complaint in that case, which was a steam planing mill, which had long been established in the neighborhood, had been burned down, and the injunction asked for was against its reërection, and which the majority of the court thought was not within the rule, he proceeds: "These observations give no just grounds to draw the inference that a powder magazine or depot of nitro-glycerine, or other like explosive materials, might not possibly be enjoined, even if not prohibited, as they usually are, by ordinance or law. It is not on the ground alone of their liability to fire, primarily, or even secondarily, that they may possibly be dealt with as nuisances, but on account of their liability to explosion by contact with the smallest spark of fire, and the utter impossibility to guard against the consequences, or set bounds to the injury which, being instantaneous, extends alike to property and persons within its reach. The destructiveness of these agents results from the irrepressible gases once set in motion, infinitely more than from fires which might ensue as a consequence. Persons and property in the neighborhood of a burning building, let it burn ever so fiercely, in most cases have a chance of escaping injury. Not so when explosive forces instantly prostrate everything near them, as in the instances of powder, nitro-glycerine, and other chemicals of an explosive or instantly inflammable nature." This reason is so cogent that nothing could be added which would increase its force.

All that remains, then, is to inquire whether the circumstances of the neighborhood in which it was proposed to establish the magazine in question are such as to bring it within the rule. Let us remember that it is a new erection which is asked to be enjoined, not the continuance of an old one. Actual irreparable damages, actual depreciation of property, of course, does not exist. It is the prevention of these consequences which is the object of the process. Perhaps the immediate neighborhood is not so densely filled up, as — in connection with the evidence in the case of the careful construction and location of the building to guard against the worst probable consequences of an explosion — would justify the court in ordering its removal. But, as we have shown, this is not the case. The neighborhood is not thickly settled, but it is fast filling up. Land is in demand for small buildings, villas, and country residences, and its market value before this structure was contemplated was at a high figure. It is evident that it must sensibly affect that value and the growth of the district. This might not, however, be sufficient of itself.

The borough of Sharpsburg is a thriving suburban village of this great western metropolis, where already many persons engaged in professional, mercantile, or manufacturing business, have purchased sites, erected houses, and permanently reside, in order to escape from the smoke, soot, and noise of the city. The distance of the structure complained of from the line of the borough is about half a mile. An explosion might do serious injury, at least by breaking glass, even at that distance, and it is not beyond the reach of a projectile. It is all futile to sit down and calculate, as if by a mathematical *formula*, the force, size, and direction of such a projectile. The natural laws which govern the direction of such forces are as yet undiscovered. It must, in the nature of things, be the merest conjecture. The evidence in the cause in regard to the explosion which occurred near Maysville, Kentucky, showed this very clearly. The house of the witness, Isaac Swartzwelder, was situated seven eighths of a mile from the magazine. He said: "The explosion bursted every window and door of my house right open; it took the windows right out. There was a rock weighed eighty pounds; some one weighed it next morning. It fell right back of where I was sleeping, within eighteen inches of where I was laying." Another witness testified: "At the time the powder house in Brooklyn, containing eight hundred or one thousand kegs of powder — eighteen to twenty-tons — exploded, it broke glass at Fly-market, New York city, clear across the Sound, about three fourths of a mile." One of the complainants, Mr. Weir, has his residence within five hundred and ten feet of the magazine, and there are several other residences further off, but still within the reach of the consequences of an explosion, if reliance is to be placed upon such facts as these. Even the witnesses for the defendant — some of them military men of great experience and sound judgment — admit there would be some danger from an explosion if it should occur; but they consider the danger as very slight, and that the location and construction of the building are well calculated to guard against the worst consequences. But besides all this a public turnpike road runs very near the building. As the master reports, "from the centre thereof to the magazine the distance is one hundred and fifteen feet, or ninety-five feet from the inner edge." It is peculiarly exposed

to danger, for the magazine is constructed in a ravine, funnel-shaped, opening out towards the road. It presents, with its rocky bed and sides, a huge mortar aimed directly at the turnpike. We may take what the master reports upon this subject: "Were the magazine in controversy to explode while four hundred to six hundred kegs of powder were stored in it, the direct effect of the explosive force would be to strike the walls of the excavation, blowing off all the surface and loose rock down to the solid slate rock. This dirt, rock, &c., would be thrown in all directions, and, if any of it was large enough, would be converted into projectiles and thrown a considerable distance from the place of explosion, and might do considerable harm; but the main force of the explosion would be directed towards the open side of the excavation on the northwest side of the magazine, converting the excavation and ravine, as it were, into a large mortar, blowing all before it, and destroying everything that might be standing on the turnpike, or on the opposite hill-side, within the focus of the mouth of the ravine."

We have come to the conclusion, then, that the complainants in the bill in the court below were entitled to the relief for which they prayed.

Decree reversed. And now it is ordered and decreed that this cause be remitted to the court below, with direction to issue an injunction conformably to the prayer of the bill restraining the defendant, Arthur Kirk, from maintaining a powder house or powder magazine on the premises described in the bill, and from erecting and constructing such a powder house or magazine in that vicinity.

Costs of the appeal to be paid by the appellee.

WILLIAMS and MERCUR, JJ. dissented.

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

[JUNE TERM, 1873.]

DIVORCE. — FRAUD AS GROUND FOR. — ECCLESIASTICAL AND EQUITY JURISDICTION. — CONCEALMENT AND WANT OF CHASTITY.

CARRIS v. *CARRIS.*

All the powers of the ecclesiastical courts, which are necessary for the protection of civil rights, and which have not been lodged elsewhere, may be exercised in this country, by the courts of chancery.

Courts of chancery, therefore, have jurisdiction to annul a contract of marriage on the ground of fraud.

The parties were married; the complainant, the husband, supposing from her acts and otherwise that the defendant, the wife, was at the time of the marriage virtuous. Two months after the marriage the defendant was delivered of a full-grown child. Held: that the want of chastity and concealment avoided the consent, and constituted a fraud upon which a court of equity would declare the marriage void ab initio. VANSYCKEL, J., *dissenting, held that the court was without jurisdiction.*

THIS was an appeal from the decision of the chancellor on a bill filed

by Solomon Carris, for the purpose of having the marriage contract, existing between him and Bertha Carris, declared null and void. The bill set forth that the said Solomon Carris was joined in wedlock to Bertha Carris; that two months after the marriage a full-grown child was born of the said Bertha Carris; that the child was the offspring of some person unknown to the complainant, and that the complainant had had no intercourse with the said defendant until the marriage; that the defendant at the time of her marriage to the complainant concealed her pregnancy from him so that he remained in ignorance of the real condition of the defendant until she gave birth to the child. The bill further set forth that the complainant would not have entered into the said marriage contract had he known that the defendant was with child, and that he was induced to marry her on the belief of her being a virtuous woman, &c.

The chancellor dismissed the bill on the ground that the complainant was not entitled to the relief prayed for, for the following reasons: "The bill is filed for a decree on the ground of ante-nuptial incontinence, and on the ground that two months after marriage she was delivered of a full-grown child, gotten by some one besides the complainant, and concealed her pregnancy from him."

"Such want of chastity and concealment are no ground for divorce."

Samuel Kalisch, Esq., for the appellant, argued as follows: —

Marriage under our law is considered in no other light than as a civil contract. 1 Black Com. p. 433. We find in it all the ingredients necessary to constitute a valid contract — parties, consent, subject matter, and consideration. The law, however, in its wisdom exalted the marriage contract a grade higher than other civil contracts based on reasons springing from public policy. The distinction which exists between a marriage contract and other civil contracts arises after the marriage contract is consummated. For the law, having a peculiar regard for the social welfare, guards the marriage relation with peculiar jealousy. It prevents the parties from rescinding, while in other civil contracts no such restriction exists. In making, however, a marriage contract, the same requisites necessary to constitute a valid civil contract are required; and the peculiarity of the contract exists in the fact that the indissolubility of it does not attach unless all the previous essential elements necessary to make a valid contract are fully and fairly complied with. If fraud is used it vitiates it. Now, in a marriage contract we have parties, the male and female; consideration, the promise for promise; subject matter, the marriage and consent.

For instance, where there is no consent, or consent is obtained by fraud, and all the other elements concur, can it be said that the peculiar status of a marriage contract attaches? Can it be considered a valid contract of marriage? Is it a contract at all? It cannot be considered a valid contract, for its most essential ingredient is lacking, that of consent. The contract it seems would be void *ab initio*. Now, in the case in question, we find A, an inexperienced man of twenty-one; B engages his affection and he consents to marry her; B, however, is pregnant, which fact she adroitly and effectually conceals from the knowledge of A. B is aware in her own mind that if she discloses the fact to A that she is with child by C, A will refuse to marry her. She remains perfectly silent, and al-

lows A to be misled and to defraud himself. A believes that in marrying B he marries a chaste and virtuous woman, *and the offspring of such marriage shall be of his own blood and not that of another.* A married B, and two months after marriage she gives birth to a child, upon which A immediately leaves B. It is now contended that B misled A, and practised fraud on him by concealing her pregnancy; that their minds never met, because, if A had full knowledge of the facts which were material, he would never have entered into a marriage contract with B. So skilful was the defendant in her manner of dressing, that even persons who were at the head of large families did not detect that the defendant was with child (notwithstanding their daily contact with her) until she gave birth to one. Although she made no express representations in respect to her chastity, she did by her acts and manner effectually conceal her condition from the complainant for the purpose of ensnaring him into a marriage with her. It is settled in the State of Massachusetts that express representations are not necessary; and the court held there as follows: "In order to sustain a petition for a sentence of nullity of marriage on the ground of fraud in the contract, that the woman was pregnant by another man than the petitioner at the date of the marriage, and that she fraudulently induced him to believe she was chaste, it is not necessary to prove express representations by the woman as to her chastity." See 9 Allen, 140. And this seems to be the general rule. The withholding of material facts which ought to be disclosed in other contracts, and which would have prevented the contract from being made, and thereby one of the parties to the contract is misled, being ignorant of such facts, such contract no doubt would be set aside by a court of equity on the ground of fraud.

"And if a woman be with child by a stranger and her intended husband be ignorant thereof, he shall have a divorce, for the fraud upon him vitiates the contract." 13 Cal. 87. And all the cases upon this topic show that where a woman is pregnant by a stranger, and conceals that fact from her intended husband, and he marries her on the faith that she is chaste and virtuous, and able to comply with the marital obligation and rights, and he discovers that she bears in her womb the fruits of an illicit intercourse, courts of equity will annul the marriage contract on the ground of fraud. Bishop on Mar. and Div. 19, sec. 105; *Reynolds* v. *Reynolds*, 3 Allen, 605, 606, and 607; Wright (Ohio) 1, 630; *Scott* v. *Shufeldt*, 5 Paige Ch. 43; 9 Allen, 140.

The present case is one of far greater strength than those in which courts of equity have interfered. The testimony shows a clear case of deliberate fraud on the part of the defendant. It is apparent from a careful perusal of all the cases above cited, that the powers of a court of equity were not invoked for the purpose of granting divorces for mere ante-nuptial incontinence or pregnancy, but upon the ground of fraud, by concealing the pregnancy from the knowledge of the complainant.

Courts of equity have unlimited jurisdiction over cases of fraud, and their power in that respect is not questioned. Although there is no statutory power given to the chancellor to grant divorces for any other causes except those specified in the statute, there is no restriction, nor ever has been, on the power of the chancellor to vacate contracts fraudulently

made. And whether a marriage or other civil contract, courts of equity have full power to set it aside. In New Jersey, in the case of *McClurg* v. *Terry*, 6 C. E. Green, 229, the chancellor says: "In the State of New York, Chancellor Kent and Chancellor Sandford both held with statutes more restricted than that of New Jersey, that the power of declaring marriages void for fraud or force was vested in the court of chancery. See *Aymar* v. *Roff*, 3 John. Ch. 49; *Wightman* v. *Wightman*, 4 Johns. Ch. 343; *Ferlat* v. *Gojon*, Hopk. 478. And the supreme court of the State of Vermont, in *Clark* v. *Field*, 13 Vermont, 460, on appeal from chancery, in a well considered opinion delivered by Chief Justice Williams, held that the court of chancery of that State had the power, without any direct delegation of it for that purpose, to declare a marriage produced by fraud and force to be void. I am satisfied that this court has the power, and this is the proper case to declare the marriage a nullity."

The opinion of the court was delivered by

BEDLE, J. The object of this bill is to annul a marriage between these parties on the ground of fraud.

The case shows that they were married November 12, 1871, and that about two and a half months after the marriage the wife was delivered of a full-grown child of which the husband was not the father; also that he had no knowledge or information that she was with child till its birth; also that he had not any connection with her previous to the marriage; and that by reason of her artifice in her mode of dress and conduct, he, a very young man, was deceived and defrauded as to her condition. The testimony of the complainant is sufficiently supported to justify these conclusions.

The complainant left his wife as soon as her condition was discovered. A decree was refused for the reason "that such want of chastity and concealment are no grounds of divorce," — the case having been likened by the chancellor, as it seems to me, to one merely of ante-nuptial incontinence. Ante-nuptial incontinence is, undoubtedly, insufficient to annul a marriage; but this case goes further than that, and rests not only there, but upon the fact of pregnancy and a fraudulent concealment at the time of the marriage.

Has the court of chancery, then, for this cause, jurisdiction to annul the marriage?

I am not aware of any case in this State that will throw any light on that question, and the reason is, that previous to the present constitution the marriage relation was dissolved by the legislature when causes existed outside of those mentioned in the statute. Since the adoption of the constitution of 1844, providing that "no divorce shall be granted by the legislature," the question has become important whether the court of chancery of this State has any jurisdiction to declare a marriage void, or to dissolve it for causes antecedent to it; except the two mentioned in the statute, which are where another husband or wife is living at the time of the second marriage, and, also, where the parties are within the prohibited degrees.

If the jurisdiction of the court is purely statutory, then there is no power in this State to declare the marriage of a lunatic, idiot, or infant of want of age, void. Such a marriage, it is true, might be treated collater-

ally as void; but, without the power stated, the ceremony that may have been performed in such a case could not be set aside by direct judicial action. And so in case of consent extorted by duress, where there may be a color of marriage, yet lacking the element of consent which is necessary in every marriage. Cases of this character necessarily call for the existence of an adequate jurisdiction in every well organized and enlightened government, and it can hardly be supposed that our existing system of courts is impotent to furnish it. The doubt arises from the fact that no such jurisdiction was exercised by the English court of chancery, and that it was exercised by the ecclesiastical courts alone. Practically speaking, therefore, that jurisdiction was exclusive of the court of chancery, and, for that reason, there is a want of adjudication as to the dormant powers of this latter court. The report of an anonymous case in second Shower (case 269), shows that during the times of the English Revolution they sued for alimony in chancery. Alimony was peculiarly a subject of ecclesiastical jurisdiction. The language of the report is this: "In the late times they sued for alimony in chancery, and the judges were then of opinion that there being no spiritual courts nor civil law the chancery had the jurisdiction in those days; but now we have courts Christian the chancery will allow of demurrers for such bills for alimony." This would seem to indicate that there were latent powers in that court not exercised, by reason of the existence of other courts peculiarly adapted to those matters. And in South Carolina the court of chancery without the aid of a statute assumed jurisdiction upon the same subject. *Jelineau* v. *Jelineau*, 2 Des. 45.

This shows the adaptability of that court to supply a remedy within the scope of its general jurisdiction where none is otherwise provided. The late chancellor in the case of *McClurg* v. *Terry*, 6 C. E. Green, 226, believed from the nature of the court of chancery and the present character of our constitution and of the courts established under it, that the power must necessarily exist to declare a ceremony of marriage void, where neither party in earnest consented to it; and accordingly declared the same a nullity. That case holds the existence of such a jurisdiction apart from the statute. To my mind that decision is formed in sound law, and the principle of it would undoubtedly include all the cases of lunacy, idiocy, and duress already instanced. The following cases recognize such a jurisdiction as inherent in a court of equity: *Wightman* v. *Wightman*, 4 Johns. Ch. 343; *Ferlat* v. *Gojon*, Hopk. 478; *Aymar* v. *Roff*, 3 Johns. Ch. 49; *Clark* v. *Field*, 13 Vt. 460.

The effect of lunacy, idiocy, infancy, and frauds upon contracts, and declaring void the same when so affected, are well settled matters of equity jurisdiction, and unless there is something so peculiar in the marriage contract as to except it from the scope of such jurisdiction, there is no reason why it should not be exercised. Marriage is regarded in our law, although peculiar in its nature, and subject to many considerations of public policy, and having much of religious sanction about it, as a civil contract. Under our political system it can only be looked at in its civil aspect. As a civil contract, the common law holds, among other essentials, that consent is necessary to its validity, and there is no difference in that respect whether the adjudication is made by the ecclesiastical courts or the courts of common law, in England.

In England, the ecclesiastical courts were a part of the religious establishment of the government, and had jurisdiction over the marriage relation as well in reference to the mere civil or common law features of it as its religious. Such a religious establishment being inimical to our institutions, the policy of our laws has been to distribute among the common law and equity courts, or special tribunals adopted or constituted for the purpose, as in the case of the prerogative and orphans' courts, all the powers of the ecclesiastical courts which are necessary and proper for the protection and enforcement of civil rights. Whenever, then, it is necessary to secure a civil right or to be redressed for civil wrongs, we naturally expect the proper jurisdiction to be found amongst the existing courts, even if those rights or wrongs were subjects of ecclesiastical jurisdiction. The mere fact that the marriage relation was always annulled in England by the courts Christian, apart from an act of parliament, ought not in itself, when the case is not canonical merely, but founded on a common law right, to be sufficient to exclude judicial action where no such court exists, when an appropriate jurisdiction is found in another tribunal.

Our constitution was framed on the idea that the legislative, executive, and judicial departments of the government should be entirely distinct, and that *all judicial power* should be vested in the then existing courts and such inferior courts as might be afterwards established.

The dissolution of the marriage contract for antecedent causes was by judicial action; the aid of parliament being sought only to dissolve for causes subsequent to the marriage, and then, as a rule, only after the ecclesiastical courts had separated the parties *a mensa et thoro*. Those courts had no power to dissolve for subsequent causes, not even adultery, but for antecedent causes they could annul the marriage. Such action was purely judicial. So far, then, as that was based upon causes affecting the essentials of the marriage, as recognized by the English common law and divested of mere canonical considerations, to that extent the jurisdiction of those courts should be regarded as lodged in our court of chancery under its appropriate powers where the subjects are fitting. This view I think must necessarily result from the character of our constitution, for in its very framework there seems to be a necessary implication, that when the legislature was prohibited from granting a divorce and no substituted jurisdiction specially provided, that the existing tribunals were sufficient to secure the integrity of the marriage contract.

It may be said that the structure of part of our act of divorce is such as to give encouragement to the idea that the jurisdiction of the court of chancery in the respect in question was purely statutory, for the first section provides that "the court of chancery shall have jurisdiction of all causes of divorce and of alimony or maintenance, by this bill directed and allowed." The original act was passed in 1794, and I suppose that previous to that time the legislature, both colonial and state, did the whole business of divorcing. But that is not conclusive on the question before us, for no judicial tribunal in England could divorce absolutely for causes subsequent to the marriage, and without legislation our court of chancery clearly had no such power.

So far then as adultery and desertion are concerned, our act was an enabling act. That consideration alone would explain the use of the

general language stated, although some causes of divorce are mentioned upon which the court might perhaps act without it.

The jurisdiction sought in this case is to annul for fraud, for fraud in the consent, and is akin to that in a case of lunacy, idiocy, or infancy, for these latter all have to do with the consent.

Fraud is a well recognized subject of equity jurisdiction: the cause, speaking generally, is appropriate to an equity tribunal. The character of the relief sought is the annulling of the contract, and that, also, is a settled equity power; and unless the actions of the court of chancery can be invoked upon the contract itself where consent is wanting, whether for idiocy, lunacy, want of age, or fraud, the strange result would follow that such contracts could only be attacked collaterally, and no way provided among an enlightened people to relieve from the embarrassment and mischiefs of the illegal contract by blotting it out. Speaking generally, then, the jurisdiction of our court of chancery to annul fraudulent contracts is sufficient to include the contract of marriage, and, although a new application of it, I see nothing in the nature of the marriage relation as viewed by our law to prevent its exercise. The absence of ecclesiastical courts, and the existence in the court of chancery of the general jurisdiction stated, and no provision in the constitution for a different tribunal, and consent being a common law essential to the marriage contract, all show that that jurisdiction must embrace the right to annul such a contract for a sufficient fraud. Apart from the implication in our constitution and our system of courts, such is the opinion, in result, of learned writers, and is in accordance with respectable adjudication made without the aid of any statute conferring jurisdiction. 2 Kent, 76, 77; Reeves Domestic Relations, 207; *Whitman* v. *Whitman; Ferlat* v. *Gojon; Clark* v. *Field*, already cited. No satisfactory light can be gathered on this subject from the history of acts in some states, in terms giving jurisdiction for fraud. Some of them may have been passed to quiet doubts upon the question, and some under the legislative belief of their necessity. But however that may be, it is a new question in this State which must be met on principle and decided accordingly.

The remaining part of the question under consideration is in reference to the sufficiency of the fraud. This is a delicate question, for the relation is peculiar, and not like other contracts, which may be dissolved by the mere act of the parties. Most serious considerations of public policy and good morals affect it, and demand that it should be indissoluble except for the gravest causes.

The mere presence of fraud in the contract is not sufficient to dissolve it. The fraud must exist alone in the common law essentials of it, and then not to have the effect of avoiding it against sound considerations of public policy. As already stated, ante-nuptial incontinence though fraudulent, is not sufficient. Neither is the mere mistake of the husband as to the paternity of a child born after marriage, but begotten before, by another, where he himself had been guilty of criminal lewdness towards his wife before marriage, sufficient. Neither are false representations in regard to family fortune or external condition sufficient. In granting relief, courts should always be careful that no violence is done to the nature of the relation and to sound morals. It must be extraordinary fraud alone

that will justify an avoidance of the bond. The fraud charged in this case is extraordinary, peculiar, and of the most flagrant character, entering into the very essence of the contract, and, if allowed to succeed, either compelling the husband to disown the child for his own protection, or imposing upon him the necessity of recognizing and maintaining the fruit of his wife's defilement by another, and having it partake of his inheritance. In either event shame and entire alienation are the inevitable consequences. Surely there can be no good policy in such action as will either compel parties to live together under those circumstances, having only the shadow of marriage; or compel them, as would be more likely, to live totally separated, a continual annoyance to each other and a source of the greatest unhappiness. If the contract is repudiated as soon as the fraud is discovered so that there is no acquiescence in it, good morals and the protection of the integrity of the marriage relation require that an innocent man should be relieved from so great a fraud.

The general principle of the law is that fraud in a material part vitiates a contract, and the very reason why it does not apply with full force to the marriage contract is that marriage is *sui generis* in many respects, and should not be vitiated even if fraudulent when against "good policy, sound morality, and the peculiar nature of the relation." To be free from that restriction, the fraud must be of an extreme kind and an essential part of the contract. In addition to the considerations stated, the character of the fraud in this case, and its effect upon the contract, are well described by Bigelow, C. J., in an analogous case in *Reynolds* v. *Reynolds*, 3 Allen, 609. That jurist, after remarking upon the insufficiency of mere incontinence before marriage to declare it void and why, says: "But a very different question arises where, as in the case at bar, a marriage is contracted and consummated on the faith of a representation that the woman is chaste and virtuous, and it is afterwards ascertained, not only that this statement was false, but that she was at the time of making it, and when she entered into the marriage relation, pregnant with child by a man other than her husband. The material distinction between such a case and a misrepresentation as to the previous chastity of a woman, is obvious and palpable. The latter relates only to her conduct and character prior to the contract, while the former touches directly her actual present condition and her fitness to execute the marriage contract and take on herself the duties of a chaste and faithful wife. It is not going too far to say that a woman who has not only submitted to the embraces of another man, but who also bears in her womb the fruit of such illicit intercourse, has during the period of her gestation incapacitated herself from making and executing a valid contract of marriage with a man who takes her as his wife in ignorance of her condition, and in the faith of representations that she is chaste and virtuous. In such a case, the concealment and false statement go directly to the essentials of the marriage contract, and operate as a fraud of the grossest character on him with whom she enters into that relation. One of the leading and most important objects of the institution of marriage under our laws is the procreation of children who shall with certainty be known by their parents as the pure offspring of their union. A husband has a right to require that his wife shall not bear to his bed aliens to his board and lineage. This is implied in the very nature of the contract of mar-

riage. Therefore, a woman who is incapable of bearing a child to her husband at the time of her marriage, by reason of her pregnancy by another man, is unable to perform an important part of the contract into which she enters, and any representation which leads to the belief that she is in a marriageable condition is a false statement of a fact material to this contract, and on well settled principles affords good ground for setting it aside and declaring the marriage void."

I have quoted this at length because it is the judgment of a highly respectable court on the essential character of the fraud and what should be its effect on the marriage relation. When that case was decided there existed in Massachusetts a statute for the court "to grant a divorce where a marriage is *supposed to be void*, or the validity thereof is doubted, on the ground of fraud;" but it designated no particular fraud that would avoid the contract, and left it to the court to determine upon principle the kind. The statute has reference only to the technical jurisdiction, assuming in principle that fraud would avoid. To my mind, that case declares the true doctrine, and the opinion shows that the result was carefully reached, and with proper caution against the encouragement of any lax notions of the marriage tie. No danger resulted from that decision, as appears from two later cases, one in 12 Allen, 26, *Foss* v. *Foss*, in which a decree was refused where a man married a woman with whom he previously had connection, and of whose pregnancy he was aware, he being assured by her that the child was his, but which turned out to be another's; the other in 97 Mass. 330, *Crehore* v. *Crehore*, where the husband became acquainted with a woman and soon after had intercourse with her before marriage, when she stated she was then with child, but the next morning on being told that he would not marry her if so, she said it was only nonsense, and not true. He married her, but was refused relief because he had knowledge of her uncertainty and was put on his guard.

The same principle contained in *Reynolds* v. *Reynolds* is sustained in a case in 13 Cal. 87, *Baker* v. *Baker*, opinion by Field, J., afterwards and now justice of the supreme court of the United States. That, also, was an analogous case to this. There was also a statute in California in regard to jurisdiction for fraud, but without indicating the character. In this country the weight of adjudication is in favor of dissolving the marriage for fraud like this. In England I find no case directly in point, yet the power of the ecclesiastical courts to annul for fraud in obtaining consent is well settled, as will be seen by the following references and cases: *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. R. 104; *Sullivan* v. *Sullivan*, Ib. 246; *Portsmouth* v. *Portsmouth*, 1 Hagg. Eccl. 355; *Harford* v. *Morris*, 2 Hagg. Cons. 423; *Hull* v. *Hull*, 15 Jur. 710 (5 E. L. & E. 589).

The apparent absence of direct adjudication on the point may perhaps be accounted for by the meagre character of the reports previous to 1809, where Phillimore's Reports commence (Bishop on Marriage and Divorce, sec. 13). At any rate there is no indication in the text-books against it; and if fraud under any circumstances where the forms of consent have been gone through is to be allowed as a ground of dissolution, it should upon principle be in this case.

There ought always to be an indisposition in every court to weaken the force and soundness of the marriage tie. That consideration should

induce great carefulness, but should not deter us from advancing where principle leads us, although before in our courts the objective has not been attained.

The fraud in this case was so gross and far reaching as to avoid the consent, and for that reason the marriage must be declared null and void *ab initio*.

The decree being otherwise is *reversed*, and the record remitted for the chancellor to decree according to this opinion.

Reversed and remanded.

VANSYCKEL, J., dissenting. The parties in this case were married on the twelfth day of September, 1871, and in the following January the defendant gave birth to a child.

The husband filed his bill for a divorce on the ground that he was not the father of the child and did not know at the time of the marriage that his wife was pregnant. The chancellor refused the divorce, and an appeal was taken to this court.

The power to grant divorces in this State is lodged exclusively in the court of chancery, and this branch of its jurisdiction is exercised not by reason of any inherent power existing in the court over this subject as one of its several equity powers, but solely by virtue of express legislative authority.

The act of 1794 (Pat. Laws, 143) gave to the court of chancery jurisdiction of "all causes of divorce," but added, as the act now in force does, "by this act directed and allowed." Nixon, 246, title Divorce (3d ed. p. 223).

The causes of divorce from the bond of matrimony, specified in the act of 1794, are: 1. Where the parties are within the prohibited degrees; 2. Adultery; 3. Wilful and continued desertion for seven years; 4. Where either of the parties had another husband or wife at the time of the marriage; and, lastly, a divorce from bed and board for extreme cruelty.

By the revision of 1846, the chancery powers in respect to the grounds for divorce are in no respect amplified. Unless, therefore, it can be shown that the court of chancery as constituted in this State has a general or limited power over the question of divorce independent of any statutory enactment, the appellant is remediless.

Our court of equity has the same jurisdiction as the English chancery, with such addition as is made to it by positive law. In England, the court of chancery never extended its jurisdiction to the subject of divorce, but left the power to dissolve the marital relation to be administered exclusively by the ecclesiastical courts. The law matrimonial, so far as it obtains in this State, must lie dormant and inoperative until some court is constituted to apply it. We have as yet no judicature possessing the general power of the spiritual courts of England over this domestic relation.

But it is insisted that the jurisdiction of equity over fraudulent contracts is sufficiently comprehensive to include the contract of marriage. I think no case can be found in England where the court of chancery dissolved the marriage contract, and that here to act outside of the specified cases would be not only a clear extension of equity power, but would be in contravention of the correct interpretation of our statute, according to

the correct rule of statutory construction, as well the divorce act of 1794, as our present law, must be held to limit the causes of separation to those enumerated, and not to enlarge them.

The language is that the court of chancery shall have jurisdiction of all causes of divorce by this bill directed and allowed. *Expressio unius exclusio alterius.* This is a positive rule of construction, and the statute must in this case be a prohibition to us, unless it can be shown either that at the time of its adoption it was the settled practice of the court of chancery to grant divorces in cases of fraud, or that the power to grant such divorces was fully acknowledged.

Neither of these conditions to which this rule of interpretation may yield can be shown to exist. From the passage of the act of 1794 to the present time no one has attempted to invoke any such authority as is claimed here. This fact shows the settled conviction of our bar, which has always been learned and astute in pursuing remedies to their utmost limit.

In England, the court of chancery never exercised any power over this subject, the entire control over it being in the spiritual courts until the act of 20 and 21 Vict. c. 85, which went into operation in 1858, transferred it to a new court, styled "The Court for Divorce and Matrimonial Causes," and no case can be found in this country, where, in the absence of an express statute authorizing it, a divorce in the proper sense of that term has been granted for fraud.

The cases referred to do not establish a contrary doctrine.

In *Aymar* v. *Roff*, 3 Johns. Ch. 49, where the marriage was performed by an infant twelve years of age, in jest, Chancellor Kent did not declare it null, but made an order prohibiting all intercourse between the parties. In the subsequent case of *Wightman* v. *Wightman*, 4 Johns. Ch. 343, the same learned judge declared the marriage of a lunatic null and void.

The cases were followed by Chancellor Zabriskie in *McClurg* v. *Terry*, 6 C. E. Green, 226, in which a marriage ceremony performed in jest was declared to be a nullity.

These were all cases of a pretended marriage contract, not voidable, but absolutely void. In neither case was there any contract at all, but an entire absence of the consent necessary to consummate every contract. There was no marriage to be dissolved, nor was any decree of dissolution pronounced. The divorce power was not invoked or exercised in these cases, and they cannot be relied upon as authority to dissolve an actually existing relation for some cause which does not make it absolutely void, but merely voidable.

All that Chancellor Zabriskie says in *McClurg* v. *Terry*, and all he intends to say, is, that where the contract is absolutely void by reason of fraud or force, he can declare it null. It is important to draw sharply the distinction between void and voidable marriages. "A marriage is void when it is good for no legal purpose, and its invalidity may be maintained in any proceeding, in any court, between any parties, whether in the lifetime or after the death of the supposed husband or wife, and whether the question arises directly or collaterally." 1 Bishop, par. 105.

In these cases, either party could marry without being amenable to any penal consequences, before proceeding to annul the prior pretended mar-

riage. But a marriage merely voidable is good for all purposes until it is dissolved by a competent tribunal; and if either party should die, pending the suit and before decree, the relation would be indissoluble, and all the property rights which flow from it could be maintained by the survivor.

The cases referred to are all void marriages, and equity, under its inherent power over fraud, could declare that there had never been a contract, as well as it could declare void a forged deed which had been put upon the record, without at all encroaching on the domain of divorce. In the case of a sham marriage, it is a fraud in either party or in any third person to set it up as valid and binding.

If A by personating B should induce a clergyman to give him a certificate that B was lawfully joined in wedlock to C, it would not be doubted that our court of chancery could pronounce the supposed marriage void without arrogating to itself the divorce power. These are in no proper sense decrees of divorce; they are merely declaratory that a marriage in fact has never had existence, and consequently there can be no such thing as a divorce in such case.

In *Ferlat* v. *Gojon*, Hopk. 478, where the marriage was procured by abduction, terror, and fraud, Chancellor Sandford, on petition of the injured party, declared the contract to be utterly null; but he evidently regarded the marriage as to the plaintiff to be absolutely void and not merely voidable, and that in taking cognizance of the case he was not at all exercising the power of divorce.

In the subsequent case of *Burtis* v. *Burtis*, reported in the same book, p. 557, he says: "In the case of *Wightman* v. *Wightman*, one of the parties was a lunatic; and in the recent case of *Ferlat* v. *Gojon*, the marriage had been procured by an atrocious fraud. These marriages were clearly void, and this court pronounced the sentence of nullity. If these two decrees are denominated divorces, they did not arrogate to this court any general power of divorce, in cases not prescribed by our statute." And in this opinion Chancellor Sandford expressly dissents from the doctrine of Chancellor Kent in *Wightman* v. *Wightman*, that the power over matrimonial causes is necessarily cast upon the court of chancery, because it is not vested in any other tribunal. If this were so, our statute would be useless. In the case now before us, the marriage is not void, but voidable. It was entered into by parties capable of contracting, and was fully consummated by their consent. It is claimed to be voidable because of the fraudulent concealment of a fact. No decree can adjudge it to be void without dissolving an existing bond.

The New York cases are no authority for the claim that marriage, voidable only for fraud, can be declared void by our courts of chancery. The distinction is clearly stated between void and voidable in *Perry* v. *Perry*, 2 Paige, 504, where the court say that in cases of absolutely void marriages, for all substantial purposes of justice, the courts of common law and equity in England had concurrent jurisdiction with the ecclesiastical courts, and that the court of chancery and courts of common law always exercised the power to declare such marriages absolutely void even in a collateral proceeding. That these cases were not intended to countenance the doctrine that a marriage only voidable for fraud could be dissolved by

the court of chancery is manifest by the case of *Burtis* v. *Burtis*, before cited, in which the ground relied upon was impotency. That it is a clear fraud in an imbecile to enter into this relation no one will doubt. In the case in 3 Allen, 605, the Massachusetts court held the temporary impotency of the woman to bear children to her husband, by reason of her pregnancy by another at the time of the marriage, to be the very essence of the fraud.

Yet the same judge who decreed the contract null in *Ferlot* v. *Gojon* refused to divorce in *Burtis* v. *Burtis* for impotency, and this decision is affirmed in *Perry* v. *Perry*, upon the distinct ground that the marriage was not void but voidable.

The court discriminated between the two cases in this language: "The decision of Chancellor Sandford in *Burtis* v. *Burtis* is entirely consistent with that of his predecessor in *Wightman* v. *Wightman*. In one case the marriage was absolutely void, and this court in the exercise of its ordinary jurisdiction had a right to remove the apparent obstruction to the wife's contracting matrimony with any other person. In the other case there was a good marriage *de facto*, and the court very properly decided that the power to dissolve such a marriage did not exist in this State, except by interference of the legislature."

The cases in Massachusetts, California, and the later New York cases, and the cases in some other states, are under a statute extending the divorce power to cases of fraud, and are, therefore, of no authority here.

. . . . The insistment is that the court of chancery shall have jurisdiction not only of all causes of divorce by the statute specified, but of others not enumerated. In other words, that the statute was designed to add the specified causes of divorce to the causes for fraud which it is claimed equity could before that entertain. Now if it can be shown that one of the causes specified in the statute is fraud of a particular character, it must be held to exclude every other kind of fraud. Prior marriage is one of the causes named in the statute, and that it is a fraud of the most grievous character in one who is married to induce another to enter into that relation with him, will be admitted.

The fact, therefore, that in addition to causes not before cognizable in chancery one cause for fraud is specified by the statute, excludes every other kind of fraud but the one mentioned.

But if jurisdiction is assumed on the ground that marriage is a civil contract, and that equity has inherent jurisdiction to vacate all contracts for fraud, where will the line be drawn? The power to annul and dissolve this contract for fraud must be coextensive with the power over other contracts, in analogy to which this power is claimed.

Bishop affirms that this is the most difficult topic of the entire subject of Marriage and Divorce, and that he is not satisfied with the views he has taken in the earlier editions of his work. In his last edition he recasts his former chapter on this subject, and lays down the proposition, that in reason whatever of fraud, of error, or duress will vitiate any other contract should ordinarily be received as sufficient to destroy and set aside this engagement, whether executed or executory, viewed as a thing separate from the consummation which follows; and he admits his inability to define what fraud, in kind and amount, should, under the cases, be deemed

sufficient. The difficulty is inherent in the nature of the subject, for no court can accurately define what fraud is.

There may be a variety of fraudulent acts coupled with circumstances of conspiracy, neither of which, standing alone, would have the required force, but which, taken together, might impel the judicial mind to concede that the case was made out. Nor can any certain guide be drawn from adjudged cases in the ecclesiastical courts.

The frauds which I find have moved the spiritual courts to grant the separation are impotency, a prior marriage, and error, where the party, supposing he was joined to one person, was actually united to another and a different person; and it has been held that where a party obtained a divorce in the spiritual courts by fraudulently persuading the court to believe that he was impotent, and subsequently married and had children by the second wife, such second marriage would be dissolved and the children declared illegitimate. Bishop, par. 114, note. In *Bury's case*, 5 Coke, 98, such second marriage was held to be voidable only, and to be good for all purposes until annulled by a competent tribunal.

If we adopt the view that this court will be controlled by established precedents in the ecclesiastical courts, not only must we divorce for impotency, for mistake as to identity of the other contracting party, and for fraud in setting up and obtaining a divorce for alleged impotency when it did not exist, but this case must fall unless it can be shown that those courts have granted a divorce for the specific cause here relied upon. No such case I think can be found.

If the limitation is claimed to be in public policy, the two obvious answers are: —

First, that jurisdiction cannot be founded upon the fact that the rule will be so applied as to promote public policy. No court can claim an ungranted power because it will be wisely used.

Second, that this would be a limitation upon the exercise of the power, and not upon the power itself, and is a subject upon which the judge of to-day and his successor had a right to differ. This doctrine, stated in plain terms, would be this: that wherever a circumstance of fraud entered into the engagement, which in the discretion of the court should annul the relation, the divorce would be declared and the issue bastardized. This opens the entire field of fraud to this topic of contention.

There is another difficulty worthy of consideration which suggests itself. The statute does not apply to these cases of fraud, and, therefore, residence in the State is not necessary to enable suit to be instituted. Are our courts to be thrown open to citizens of other states to agitate the many questions which must arise in this new and untried field of litigation?

If the framer of our statute had supposed that our court of chancery had any such extended power as is now claimed for it, he would undoubtedly have provided for this difficulty. It is an imperfection in our law that it does not provide for a wrong so grievous as that set up by the complainant in this bill, but it belongs to the legislature and not to this court to provide the remedy.

There is another obstacle in the way of granting this divorce. It may well be doubted whether the chancellor was satisfied from the evidence

that the fact relied upon for the divorce was proved by testimony other than that of the complainant himself. If he had refused the divorce on this account I should be unwilling to disturb his decree.

I am of the opinion that we have no power to grant the relief prayed for, and that the decree of the court below should be affirmed.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1873.]

LIABILITY OF EXECUTORS FOR FUNDS INVESTED IN CONFEDERATE BONDS.

HORN v. *LOCKHART.*

An executor is personally liable for money of his testator invested in Confederate bonds, even if such investment was approved by a court having charge of the settlement of the estate.

MR. JUSTICE FIELD delivered the opinion of the court.

. . . . . .

Upon the accounts presented by the executor of the probate court in Alabama, for settlement, it appears that he received moneys from the sales of property belonging to the estate of the testator amounting to over $7,000, and invested the same in bonds of the Confederate States. By the decree of the probate court this investment was approved, and the executor was directed to pay the legatees their respective shares in those bonds. Now, the question is, whether this disposition of the moneys thus received, and the decree of the court, are a sufficient answer on the part of the executor to the present suit of the legatees to compel an accounting and payment to them of their shares of those funds.

It would seem that there could be but one answer to this question. The bonds of the Confederate States were issued for the avowed purpose of raising funds to prosecute the war when waged by them against the government of the United States. The investment was, therefore, a direct contribution to the resources of the Confederate government; it was an act giving aid and comfort to the enemies of the United States; and the invalidity of any transaction of that kind, from whatever source originating, ought not to be a debatable matter in the courts of the United States. No legislation of Alabama, no act of its convention, no judgment of its tribunals, and no decree of the Confederate government could make such a transaction lawful.

We admit that the acts of the several states in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not

loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the Constitution. The validity of the action of the probate court of Alabama in the present case, in the settlement of the accounts of the executor, we do not question, except so far as it approves the investment of funds received by him in Confederate bonds, and directs payment to the legatees of their distributive shares in those bonds. Its action in this respect was an absolute nullity, and can afford no protection to the executor in the courts of the United States.

The act of Alabama, which the executor invokes in justification of the investment, has been very properly pronounced unconstitutional by the highest tribunal of that State (*Houston* v. *Deloach*, 43 Ala. 364; *Powell* v. *Boon & Booth*, Ib. 459), and the attempt of its legislature to release executors and trustees from accounting for assets in their hands invested in a similar manner rests upon no firmer foundation.

Had the legatees of the testator voluntarily accepted the bonds in discharge of their respective legacies, the case would have presented a very different aspect to us. The estate might then have been treated as closed and settled, but such is not the fact. The bonds were never accepted by the legatees, nor does it appear that the executor even went so far as to offer the bonds to them.

It is urged by counsel for at least a modification of the judgment of the circuit court, that the money received by the executor was in Confederate notes, which at the time constituted the currency of the Confederate States. It does not appear, however, that he was under any compulsion to receive the notes. The estate came into his hands in January, 1858, and no explanation is given for his delay in effecting a settlement until the war became flagrant. And even then he was not bound to part with the title to the property in his hands without receiving an equivalent in good money, or such, at least, as the legatees were willing to accept. *Judgment affirmed.*

SWAYNE, DAVIS, and STRONG, JJ., dissented.

LIFE INSURANCE. — RULE AS TO ANSWERS TOUCHING FORMER HEALTH.

MANHATTAN LIFE INS. CO. v. *FRANCISCO.*

It is for the jury to determine what is meant by the term disease, as used in the application for insurance. Substantial truth is alone required in the answers of the assured.

MR. JUSTICE STRONG delivered the opinion of the court.

. . . . . .

The principal defence set up at the trial was, that in the application for insurance false answers had been given to the questions propounded by the defendants. Those questions were, in substance, whether the person whose life was proposed for insurance had had certain diseases, or, during the next preceding seven years, any disease, and the answers given were that he had not. It was in reference to this that the court instructed the jury it was for them to determine from the evidence whether the person whose life was insured had, during the time mentioned in the questions propounded on making the application, any affliction that could properly be called a sickness or disease, within the meaning of the term as used, and said, "For example, a man might have a slight cold in the head, or a slight headache, that in no way seriously affected his health or interfered with his usual avocations, and might be forgotten in a week or a month, which might be of so trifling a character as not to constitute a sickness or a disease within the meaning of the term as used, and which the party would not be required to mention in answering the questions. But again, he might have a cold or a headache of so serious a character as to be a sickness or disease within the meaning of those terms as used, which it would be his duty to mention, and a failure to mention which would make his answer false."

There is no just ground of complaint in this instruction, either considered abstractly, or in its application to the evidence in the case. It was, in effect, saying that substantial truth in the answer was what was required. If, therefore, the defendants have been injured it was by the verdict of the jury rather than by any error of the court.

The judgment is affirmed.

SUPREME COURT OF PENNSYLVANIA.

[JANUARY, 1874.]

CONSTRUCTION OF THE WORD "TO" AS FIXING A DATE.

CONAWANGO PET. REF. CO. v. *CUNNINGHAM.*

The word "to" *held to be* inclusive — to *December* 31, *held to* include *December* 31.

THE opinion of the court was delivered by

AGNEW, C. J. The contract in this case was for the sale of "one thousand barrels good green merchantable crude petroleum, forty gallons to the barrel, gravity forty to forty-six degrees, at a temperature of sixty degrees Fahrenheit, to be delivered, buyer's option, at any time from this date *to* December 31, 1870, in bulk cars," &c. Does the expression *to* December 31, 1870, include the 31st day?

This question cannot be decided by cases which interpret dubious expressions in law or rules of court, in order to preserve rights or fulfil special purposes. What we are concerned with here is in ascertaining the meaning of the parties in this particular contract. The preposition *to* is prop-

erly applicable to *place* or *position*, while *till* or *until* properly applies to "time." Yet *to* is in common parlance, and sometimes in legal phraseology, applied to time. It has also various significations indicating toward, to, and into. In regard to time, it often indicates a coming or passing into a day, as well as arrival at it. Thus it is said, "The court adjourned from the 30th to the 31st of December," or "from the first to the thirty-first," or "from day to day." Now in each instance we understand that the court will reassemble on the last day. Whenever the expression is from day to day, or from one day to another, we always understand the second day to be included. Again, one says, "I have to the 31st to do a thing;" or the other says, "You shall have to the 31st to do it." No one doubts the party can do the thing on the 31st. Such is the time designated for performance. Another expression to be found in this contract affords an illustration, to wit, "Gravity from forty to forty-six degrees." It cannot be doubted if the oil be of a gravity of either forty or forty-six degrees it would fill the contract. Let us expand the language of this writing somewhat. The words of it are, "To be delivered, buyer's option, at any time from this date to December 31st, 1870." Then read it thus, the seller saying, "I will deliver to you one thousand barrels of oil at any time from this date to December 31st, 1870, at your option." Can it be doubted that when the seller says, "I will deliver at your option," the buyer may call for the delivery of the oil on the 31st, and the seller would be bound to deliver it. The parties did not refer themselves to "decided cases," but had their own meaning, which was that the limit should be the 31st day of December;—that, the last day of performance. The selection of the last day of the month and of the year has some influence in fixing that as the last day of performance, as if the parties had said, "All the month of December, or all this year." January 1st begins a new period. The time is necessarily mutual, so that if the buyer may demand on the 31st, the seller may deliver on the 31st.

The fact that a subsequent contract adds the word "inclusive" after the 31st of December, does not interpret the prior contract, which is without the word "inclusive." The earlier contract must stand on its own language. The insertion of the word in the second contract may have been due to greater precision, or greater precaution to prevent misconstruction, and yet they may mean the same thing. It does not follow because the latter is expressly "inclusive," the former meant to be "exclusive." We, therefore, interpret the language as we think the parties intended, to wit, that the buyer could call for the oil in the year 1870, and before the 1st of January, 1871; the word "to" having no precise and definite signification to require exclusion of the last day, by reason of its plain grammatical meaning.

The case of *Cleveland* v. *Sterrett*, 20 P. F. Smith, 204, was decided in the same spirit of liberal interpretation to reach the evident intent of the parties.

The judgment of the court below is reversed, and judgment is now entered for the plaintiff on the case stated, for the sum of fourteen hundred dollars, with interest from July 12th, 1873.

COURT OF APPEALS OF KENTUCKY.

PRINCIPAL AND SURETY. — EFFECT OF PUBLICATION OF REPORTS REQUIRED BY NATIONAL CURRENCY ACT. — DEFALCATION OF CASHIER. — ESTOPPEL.

GRAVES v. *LEBANON NATIONAL BANK.*

Held: that the sureties upon the bond of a cashier of a national bank were not liable to the directors of the bank for losses caused by the defalcation of the cashier, where the sureties were misled as to the condition and management of the bank by the publication of reports required by the national currency act, and the bond was entered into subsequent to and the defalcation occurred before the publication of the reports.

It seems that the publication of the reports after the sureties had entered upon the bond did not estop the directors to allege the existence of facts that could be established only by proving the falsity of the reports.

THE opinion of the court was delivered by

LINDSAY, J. The Lebanon National Bank organized under the provisions of the act of Congress of June 3, 1864, and commenced business about the 3d of August, 1869, when Mitchell was selected as cashier, and was immediately inducted into office. Though required to execute bond immediately, the bond, for reasons not explained, was not delivered until the first of November following. In June, 1870, Mitchell was discovered to be a defaulter to a large amount, and failing to make good the losses occasioned by his breach of duty, this action was brought to recover the amount from his sureties. The defalcations for which the sureties are sought to be held liable are alleged to have occurred between the 14th of September, 1869, and June 3, 1870. The court below adjudged that they should account for such as occurred before the acceptance of the bond, and rendered judgment against them for $8,089.

The technical defences relied on are not noticed further than that the court does not regard it as essential that banking institutions, doing business under the national currency act, shall signify their acceptance of the official bonds of their cashiers by a written memorandum to that effect, entered upon the journal or minute-book by their directory. The acceptance of the bond may be presumed from the fact that after it has been submitted to the directory for approval, it is retained by the bank, and the cashier permitted to enter upon, or continue in, the discharge of his duties; and that it was presented to and approved by the directory may be established by oral testimony. 12 Wheaton, 64; 3 Pickering, 335; 2 Met. (Mass.) 522; 1 Har. & G. 324, and Morse on Banking, 223.

The first business transacted by the bank, after its organization, was the purchase of the assets of the banking firm of Burton, Mitchell & Co. Mitchell, the defaulting cashier, was a member of that firm, and had been acting as its cashier. The National Bank accepted from Burton, Mitchell & Co. bills and notes represented to amount to about $51,000, but which in point of fact amounted to only about $39,000. This discrepancy was

the result of embezzlements by Mitchell, while cashier for the firm, of which embezzlements Burton, the senior member of the firm, and afterward a director of the National Bank, may be presumed to have been ignorant. The directory seems to have relied implicitly upon the integrity of Mitchell, and he was thereby enabled not only to conceal the frauds practised on Burton, Mitchell & Co., but by such concealment to commence the discharge of his duties as cashier of the National Bank by a fraud upon it. In October, 1869, the banking association, pursuant to the provisions of section 34 of the national currency act, and the amendment thereto of March 3, 1869, made a report to the comptroller of the currency, and on the 23d of that month caused it to be published in the Lebanon Clarion, showing in detail and under appropriate heads its resources and liabilities at the close of business, October 9, 1869. This report was sworn to by Mitchell and certified to be correct by three members of the directory. Similar reports were made and published in the same newspaper touching the condition of the association on the 22d of January, 24th of May, and 9th of June, 1870. None of these reports showed embezzlements by the cashier or any other officer, or in the least excited suspicion, but on the contrary tended to inspire the public with confidence in the prosperity of the association, and in the integrity of those to whom its business affairs were committed.

Appellants plead and rely upon the statements thus officially promulgated by the officers of the bank, as constituting an estoppel upon it to assert against them claims that cannot be established without showing that these official reports, made and published in obedience to law, were not true. The court is inclined to the opinion that they cannot claim immunity upon account of any report made after they became the sureties of Mitchell. The reports are sworn to by him, and it may be assumed, that upon his representations, and upon what appeared from the books of the association, as kept by him, the directors were induced to certify to their accuracy. The directors may have been negligent in the discharge of their duties, and this negligence may have enabled Mitchell for the time to misappropriate the funds of the bank, and to conceal its true condition by the false reports made to the comptroller of the currency, and by false entries upon the books of the bank; but this negligence cannot avail the sureties who covenanted that their principal should "well and truly perform the duties" of his position, and should "well and truly account for all moneys and other valuables that might pass through his hands." Their covenant is unconditional, and no failure of duty on the part of the directors, short of actual fraud or bad faith, can be deemed sufficient to exonerate them from its performance. The exaction of the bond implies that the association was not willing to rely alone upon the watchfulness and care of the directory.

There is a question, however, arising upon the facts stated in the pleadings and fully sustained by the proof, the decision of which it seems must be in favor of the sureties, and this question being decided in their favor, their exoneration from liability on account of Mitchell's misconduct while acting as appellee's cashier, and after the bond was delivered and accepted, follows as a necessary sequence. There is no principle of law better settled than that persons proposing to become sureties to a corpo-

ration for the good conduct and fidelity of an officer to whose custody its moneys, notes, bills, and other valuables are intrusted, have the right to be treated with perfect good faith. If the directors are aware of secret facts materially affecting and increasing the obligation of the sureties, the latter are entitled to have these facts disclosed to them, a proper opportunity being presented. Morse on Banking, 206. White & Tudor, in their note to the case of *Rees* v. *Berrington*, second volume Leading Cases in Equity, 360, state the rules as follows: "Wherever, therefore, there is any misrepresentation or even concealment from the surety of any material fact which, had he been aware of, he might not have entered into the contract of suretyship, it will thereby be rendered invalid, and the surety will be discharged from his liabilities." The case cited fully sustains the principle as stated. Mr. Justice Story takes even broader ground: "Thus if a party taking a guarantee from a surety conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to a fraud, because the party is bound to make the disclosure; and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist." 1 Story's Eq. 215.

It may not be true that the directors of the Lebanon Bank had actual knowledge of the frauds committed by Mitchell while cashier of Burton, Mitchell & Co., nor of the false entries made by him on the books of the institution under their control, in order to conceal those frauds; but it is true that either with or without examination, they published reports of the affairs of the institution, the nature, if not the necessary effect of which was to mislead the public. It cannot be doubted that these reports reached the eyes of appellants, who all resided in or near Lebanon, and read the local paper in which the publications were made, and as they were each large stockholders in the bank, it may be assumed that they read and examined at all events the first official statement made by the officers of that institution. If it could be shown that the directors were cognizant of the fraud of Mitchell, committed on the first day of his connection with the bank, and in the performance of his duty as cashier, and that they concealed the fact from appellants, and published the false statement of October 9, 1869, there could be no doubt that the concealment and publication would amount to a fraud upon the sureties.

It is proper, however, to consider the legal effect of two circumstances connected with the failure of the directory to apprise the sureties of the fraud of Mitchell, and of the publication of October 23 in the Lebanon newspapers. The first is, that those directors who were witnesses in this case state that they were not apprised of the perpetration of this fraud; and the second is, that the report of October 9, 1869, published on the 23d of that month, was but a statement of the condition of the affairs of the bank, as shown by its books. Upon the first question it is to be observed that several of the directors, and among them Burton, of the former firm of Burton, Mitchell & Co., were not sworn at all, and that it appears upon the journal kept by the directory, as of date August 3, 1869, that "the bills of exchange and accounts of the firm of Burton, Mitchell & Co., bankers, having been submitted for examination, and examined,

it was resolved by the board of directors to receive the same, with the indorsement of Messrs. Burton, Mitchell & Co., and the cashier was directed to transfer the same to the books of the National Bank." From the depositions of the president of the bank, of Wilson, a director, and of Wilkins, who was first the clerk, and is now the cashier of the institution, it is manifest that the most cursory examination of the bills, notes, and accounts, turned over to the bank by Burton, Mitchell & Co. would have disclosed a deficit of more than $12,000. The proof forces the conclusion that the directory either was advised of the discrepancy in Mitchell's account, or that it relied upon his representations and the indorsement of Burton, Mitchell & Co., and made no examination, notwithstanding the notes, bills, and accounts purchased amounted to more than half as much as the capital of the institution for which they were acting. The directors may not have been bound to notify the sureties of the manner in which this transaction was conducted, but certainly the latter had the right under the circumstances, to presume that in the first business transaction of the bank, involving so considerable an amount, the directory exercised at least slight diligence, and this presumption was greatly strengthened by the published report appearing on the 23d of October. A fraud may be perpetrated as well by the assertion of facts that do not exist, ignorantly made by one whom the person acting upon the assertion has the right to suppose has used reasonable diligence to inform himself, as by concealing facts known to exist, which in equity and good conscience ought to be made known.

The publication as to the resources and liabilities of the bank on the 9th of October, 1869, does not purport to have been made from its books. It was styled "Report of the condition of the National Bank of Lebanon at the close of business, October 9, 1869," and there is nothing in it to indicate that it was founded upon the books of the association, but, on the contrary, the clear import of the language used is that it exhibited the actual condition of the affairs of the bank. Though the forms furnished by the comptroller of the currency may have authorized the reports to be made out from the books, yet it is not shown that the sureties knew anything about these forms, and looking to the law defining these duties as well of the comptroller as of the officers of the bank, they would acquire no such information. The 34th section of the currency act, as amended, requires every association organized under its provisions, at stated times, to make reports to the comptroller, which "shall exhibit in detail and under appropriate heads the resources and liabilities of the association," on five certain specified days in each year, and publish these reports in a local newspaper, and authorize the comptroller to call for special reports from any association whenever in his judgment it shall be necessary, "in order to a full and complete knowledge of its condition." It seems, therefore, that before the delivery and acceptance of the cashier's bond, and before appellants had become surety for his diligence, honesty, and fidelity, the association, pursuant to the provisions of the law to which it owed its existence, published to them and to the world a statement of its condition, from which it appeared that its affairs were being prudently and honestly administered, and from which they and the public had the right to believe that the cashier to whom had been intrusted the money, notes, and valu-

ables of the bank, had up to that time acted as a trustworthy person. If the sureties acted upon the impression thus created by the affirmative act of the party now claiming to enforce the stipulations of their bond, it is plain that they should be discharged from liability.

We have already decided that it should be presumed that the sureties did read and examine the report published October 23, 1869, and it remains to be determined whether the bond was accepted before or after that time. It bears no date except "the —— day of ——, 1869." The legal presumption therefore is, that it did not become binding on the bondsmen until the last day of that year. The bank fails to show the exact date of its delivery. One of the directors thinks it was about the 1st of October, 1869, while the president and another director fix it at about the first of November. The directory itself was not willing to fix the date of the acceptance of the bond, and, in an order entered upon the minute-book, purporting to record the action of the board at the time of its approval, neither the month nor the day is given. Considering the presumption arising from the want of specific date to the bond, and the preponderance of the testimony offered by the bank itself, we conclude that it was not accepted earlier than the 1st of November, 1869, about one week after the publication of the report of October 9, of that year.

We have, therefore, a case in which the directory of the bank held out to others as a trustworthy officer a man who had been guilty of repeated embezzlements and frauds, all of which might have been discovered by the exercise of slight diligence. However innocently the publication tending to show that Mitchell was an honest and faithful officer may have been made, the fact remains that the public had the right to act upon the presumption that the three directors, attesting the accuracy of the statement contained in the publication, had made some investigation, at least, to inform themselves as to the matters to which it related. The effect of the published report was to inspire the public with confidence in the officers of the bank, to disarm suspicion, and to prevent inquiry.

The losses occasioned by the defalcation of Mitchell, after the acceptance of his bond, must fall either on the association or his sureties. The latter are free from blame, and acted with reasonable prudence and discretion. They relied upon the truth of the representations made by those having the right to speak for the bank. These representations have turned out to be untrue. Had the sureties suspected they were untrue, it cannot be supposed that they would have entered into the contract of suretyship. Such being the case, the contract must be adjudged invalid.

The judgment against the surety is reversed, and the cause remanded, with instructions to dismiss appellee's cross petition.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1873.]

MUNICIPAL CORPORATION. — JUDGMENT UPON COUNTY WARRANTS. — MANDAMUS.

BOARD OF SUPERVISORS OF CARROLL COUNTY v. *THE UNITED STATES, EX REL. JOHN REYNOLDS. In Error to the Circuit Court of the United States, for the District of Iowa.*

Held: that mandamus will not lie against a county to compel the levy of a tax to pay a judgment recovered upon ordinary county warrants where the power to levy a tax for county purposes is limited to a specified amount, and a tax equal to such an amount has already been levied.

MR. JUSTICE STRONG delivered the opinion of the court.

On the 13th day of May, A. D. 1869, the relator obtained in the court below a judgment against the County of Carroll for the sum of $19,946.76. The judgment was for the amount due upon sundry county warrants issued for the ordinary expenditures of the county, and all of them issued after January 1, 1865. An execution having been awarded upon the judgment and returned "*nulla bona*," the relator sued out this writ of *mandamus* to compel the board of supervisors of the county to levy a specific tax, sufficient to pay the debt, interest, and costs, and to apply the same, when collected, to the payment. To this writ the supervisors returned in substance (after averring that the judgment had been obtained upon ordinary county warrants issued for the ordinary expenditures of the county), that they had levied a county tax for the current year of four mills on the dollar of the taxable property of the county, and that they proposed to levy a similar tax for each succeeding year until the judgment should be paid. They further returned that they had no power to levy a tax at any higher rate. A general demurrer to this return was then interposed, which the circuit court sustained. Hence, this writ of error.

It is very plain that a *mandamus* will not be awarded to compel county officers of a state to do any act which they are not authorized to do by the laws of the state from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred upon them by the author of their being. And it may be observed that the office of a writ of *mandamus* is not to create duties, but to compel the discharge of those already existing. A relator must always have a clear right to the performance of a duty resting on the defendant before the writ can be invoked. Is it then the duty of the board of supervisors of a county in the State of Iowa to levy a special tax, in addition to a county tax of four mills upon the dollar, to satisfy a judgment recovered against the county for its ordinary indebtedness? The question can be answered only by reference to the statutes of the State.

By an act of the legislature, enacted on the 22d of March, 1860 (Civil Code of 1860, § 302 *et seq.*), it was declared that in each organized

county of the State there should be a board of supervisors, the duties of which were defined. Prior to that time, the financial affairs of the several counties had been by the law committed to the charge of a county judge. But on the 2d day of April, 1860, a further act was passed, to take effect on the 1st day of January, 1861, which enacted that all laws in force at the time of its taking effect, devolving any jurisdiction or powers on county judges, should be held to apply to and devolve such jurisdiction upon the county board of supervisors, in the same manner and to the same extent as though the words "county board of supervisors" occurred in said laws, instead of the words "county judge." Civil Code, § 330. Whatever power, therefore, the county judge possessed, prior to that enactment, to levy taxes for any purpose, was devolved upon the county board, with all its limitations. They may levy those taxes which he was empowered to levy, and no more, unless larger authority has, by other statutes, been given to them. By the act of April 3, 1860 (Civil Code, 710), they are required to levy the following taxes annually upon the assessed value of the taxable property in the county: 1, for state revenue, one and one half mills on a dollar, when no vote is directed by the census board, and that board is prohibited from directing a vote greater than two mills on a dollar; 2, for ordinary county revenue, including the support of the poor, not more than four mills on a dollar, and a poll-tax of fifty cents; 3, for support of schools, not less than one nor more than two mills on a dollar; 4, for making and repairing bridges, not more than one mill on the dollar, whenever they shall deem it necessary.

This act confers all the powers which the county board possess to levy a tax for ordinary county revenue. It is not claimed that larger authority was ever given. And this, it is to be observed, is expressly limited to the levy of a tax of not more than four mills upon the dollar.

The board however have authority, in certain specified cases, to levy a special tax to defray certain extraordinary expenditures. Succeeding, as they did, to the powers and duties of the county judge, whatever he was authorized to do in this behalf, they may do. He had been empowered, by section 250 of the Code, to submit to the people of the county, at any regular election, or at a special one called for that purpose, the questions, whether money might be borrowed to aid in the erection of public buildings; whether the county would construct, or aid to construct, any road or bridge, which might call for an extraordinary expenditure; whether stock should be permitted to run at large, and, generally, any question of local or police regulation not inconsistent with the laws of the State.

He was also empowered, whenever the warrants of the county were depreciated in value, to submit the question whether a tax of a higher rate than that provided by law should be levied; and the 252d section enacted that, when a question so submitted involved the borrowing or expenditure of money, the submission of the question should be accompanied by a provision to lay a tax for the payment thereof, in addition to the usual tax; and that no vote approving the borrowing or expenditure should be of any effect unless the tax was also adopted. Thus it appears that the statutes of the State have made provisions for ordinary county taxes, limiting them to a rate not exceeding four mills; and also

for special taxes beyond that limit, inserting defined contingencies. No statute was in existence when this writ was sued out, authorizing the county board to levy a special tax for ordinary revenue, or for ordinary expenditure, or indeed, for any purpose except those we have noticed, unless it be found in section 3275 of the Code, to which we shall presently refer. And the legislature of the State has made a clear distinction between ordinary county taxation, which the board of county supervisors may, at their discretion, levy within prescribed limits, and special taxation for extraordinary emergencies which can only be imposed in obedience to a popular vote.

In this case the warrants upon which the relator's judgment was obtained were all ordinary warrants, drawn upon the treasurer of the county, and, as is admitted by the demurrer, drawn for the ordinary expenses of the county. None of them were issued in pursuance of a popular vote, or for any extraordinary expenditure. They were such instruments as the legislature contemplated might be employed in conducting the current and usual business of the county. The act which empowers a county board to levy a tax for ordinary county revenue speaks of them, and evidently intends that they shall be satisfied either from the proceeds of that tax, or by their being received in payment thereof. They are simply a means of anticipating ordinary revenue.

But it has been argued on behalf of the relator, that section 3275 of the Code confers upon the county board the power and makes it their duty to levy a special tax beyond the tax authorized by section 710, whenever a judgment has been recovered against the county, even though that judgment may be for ordinary county indebtedness. That section is found in a statute relating to executions, and it is as follows: "In case no property is found upon which to levy which is not exempted by the last section (sec. 3274), or if the judgment creditor elect not to issue execution against such corporation (a municipal one), he is entitled to the amount of his judgment and costs in the ordinary evidences of indebtedness issued by that corporation. And if the debtor corporation issues no scrip or evidences of debt, a tax must be levied as early as practicable, sufficient to pay off the judgment with interest and costs." The next preceding section had enacted that public buildings owned by the State or any municipal corporation, and any other public property necessary and proper for carrying out the general purpose for which any such corporation is organized, should be exempt from execution; and that the property of a private citizen should in no case be levied upon to pay the debt of such a corporation. Neither of these sections declares that a *special* tax shall or may be levied to pay any judgment against a municipal body. All that is said is, that in certain contingencies a tax must be levied sufficient to pay off the judgment. But whether this tax is to be a special one, or the tax authority to levy which was given to the county board by the 710th section, the act does not say. It is certainly remarkable that if it was intended to grant a new power to levy a tax for the payment of ordinary county indebtedness, when that indebtedness has been brought to judgment, the power should be granted, in a statute relating solely to executions, without any direction by whom it should be exercised, and that the additional grant should be left to

inference instead of being plainly expressed. The powers committed to the county board were declared in the statutes relating to it and to its duties. If others were intended to be given, it is strange, to say the least, that the gift was not made when the legislature had the subject of the board and its powers under consideration. And if a special tax to pay a judgment was contemplated, it is hard to see why it was not provided for when the legislature had the subject of special county taxes before it, and when provision was made for levying such a tax, to pay depreciated county warrants, if approved by a popular vote. We do not propose, however, to discuss the question now. It has already been answered, and we must accept the answer. The supreme court of Iowa has decided in several cases that section 3275 confers no independent power to levy a specific tax in order to pay a judgment recovered against a municipal corporation, and that when the power has not otherwise been conferred it is not given by that act. This was decided in 1863, in the case of *Clark, Dodge & Co.* v. *The City of Davenport*, 14 Iowa, 494, before any of the warrants were issued upon which the relator's judgment was founded, and the construction then given to the statute has been repeatedly asserted and consistently maintained. It is, therefore, and it always has been the settled law of the State. That the construction of the statutes of the State by its highest courts is to be regarded as determining their meaning, and generally as binding upon the United States courts, cannot be questioned. It has been asserted by us too often to admit of further debate. (See numerous cases, Bright. Fed. Dig. 163.) We have even held that when the construction of a state law has been settled by a series of decisions of the highest state court differently from that given to the statute by an earlier decision of this court, the construction given by the state courts will be adopted by us. *Green* v. *Neal's Lessee*, 6 Pet. 291; *Suydam* v. *Williamson*, 24 How. 427; *Warren* v. *Leffingwell*, 2 Black. 599. And we adopt the construction of a state statute settled in the courts of the State, though it may not accord with our opinion. *McKeen* v. *Delancy*, 5 Cranch, 22. There is every reason for this in the consideration of statutes defining the duties of state officers. It is true that when we have been called upon to consider contracts resting upon state statutes, contracts valid at the time when they were made according to the decisions of the highest courts of the State, contracts entered into on the faith of those decisions, we have declined to follow later state court decisions declaring their invalidity. But in other cases we have held ourselves bound to accept the construction given by the courts of the states to their own statutes.

It is insisted, however, that in *Butz* v. *The City of Muscatine*, 8 Wallace, 575, this court ruled that section 3275 of the Code did give power to the city council of Muscatine to levy a special tax beyond the statutory limit of ordinary city taxation, sufficient to pay a judgment which had been recovered against the city. This is true. But the facts of that case must be considered. The judgment had been recovered upon bonds issued by the city in 1854. At the time they were issued, no decision had been made by the supreme court of the State, to the effect that section 3275 was not an enabling statute authorizing a tax beyond that allowed by other statutes. It was not until nine years afterwards

that the supreme court of the State was called upon to determine its meaning. Hence this court felt at liberty to adopt its own construction and apply it to the case of the holder of the bonds, though it was adverse to that announced by the state court, years after the bonds had been issued. But at the same time it was said, "If the construction given to the statute by the state court had preceded the issuing of the bonds and become the settled law of the State before that time, the case would have presented a different aspect."

In the case we have now in hand, it appears that the warrants upon which the relator recovered his judgment not only were for the ordinary indebtedness of the county, but that they were issued after it had become the settled law of the State, announced in the decisions of its highest court, that the section of the statute relative to executions now under consideration did not enlarge the authority of a county board of supervisors, and did not authorize the levy of a tax beyond that provided for in section 710, — that is a tax in excess of the writ of four mills on the dollar. The holders of the warrants were therefore informed when they took them, that by the laws of the State no special tax could be levied for their payment, unless the question whether such a tax might be levied should first be submitted to the people and by them answered in the affirmative, according to the directions of sections 250 and 252, to which reference has heretofore been made. In this particular, the case differs from *Butz* v. *Muscatine*. Looking at the difference, we think there is no sufficient reason why we should now depart from the construction which the courts of the State have uniformly given to its statutes.

It follows, that in our judgment the return to the alternative *mandamus* was a sufficient return; that the respondents had no power to levy the special tax called for; and as a writ of *mandamus* can compel the performance only of some act which the law authorizes, that the demurrer to the return should not have been sustained.

Judgment reversed and the record remitted, with directions to give judgment on the demurrer for the defendants below.

Mr. Justice CLIFFORD, dissenting. I dissent from the judgment of the court in this case, holding that this court should adhere to its former decision, as it appears that the state statute when the bonds in that case were issued had not been construed by the state court.

Where the construction of a state statute is involved in a case presented here for decision, and it appears that the statute in question has not been construed by the state court, I hold that it is the duty of this court to ascertain and determine what is its true construction; and that this court under such circumstances will not reverse its decision in the same, or a subsequent case, even though the state court may afterward give a different construction to the same statute.

Mr. Justice SWAYNE also dissents from the judgment upon the same ground.

SUPREME COURT OF APPEALS OF VIRGINIA.

[JANUARY, 1874.]

BOND. — LIABILITY OF SURETIES WHERE CONDITION AS TO DELIVERY IS VIOLATED. — ESTOPPEL.

NASH v. *FUGATE.*

Held: that a surety upon a bond delivered by the obligor to the obligee, the face of which is such as to excite no suspicion, is estopped to deny the validity of the same on the ground of an antecedent agreement touching the delivery.

A signed a bond as surety, and delivered it to the principal obligor upon condition that it was not to be delivered to the obligee unless signed in like manner by others. Obligor delivered the bond to obligee without other signatures, and it contained no evidence of the existence of the condition made by A: Held, that A was estopped to deny as against the obligee that it was his deed.

THE opinion of the court was delivered by

STAPLES, J. It must be assumed for all the purposes of this decision that the bond in controversy was a complete and perfect instrument on its face at the time of its delivery to the obligee. The defendants' pleas and the instructions given by the court are obviously based upon this hypothesis. It must also be assumed that at the time the bond was executed by the defendants, other than the principal obligor, it was agreed that it should not be delivered to the obligee until executed by other persons besides the defendants; and further, that without being so executed it was delivered by the principal obligor to the obligee, who was not informed of the condition annexed to the delivery of the instrument.

The question is presented whether the bond under this state of facts is binding upon the parties actually executing it as sureties.

It is very clear that a deed or bond may be committed to a stranger to be delivered by him to the obligee upon the performance of a condition or the happening of an event, and if delivered before the condition is performed or the event happens, the bond will not take effect, although the obligee may not be apprised of the terms imposed, and although there is nothing on the face of the instrument to excite his suspicions or put him upon inquiry. In such case it is simply a question of power in the agent in making the delivery, and not a question of good faith in the obligee in accepting it.

The point to be considered then is, whether there is any substantial distinction between a delivery to a stranger and a delivery to the principal obligor by one who signs the instrument as surety. That such a distinction does exist, and that it is founded upon the soundest principles, I think is easily established.

When the bond is placed in the hands of a third person who is a stranger to the consideration and to the instrument, to be delivered to the obligee only upon the performance of some condition, such person is a mere custodian of the instrument until the condition is performed, having no interest or semblance of an interest in the subject matter of the contract.

The obligee finding the paper in the hands of such a person is bound to know how he obtained possession of it, and by what authority he undertakes to dispose of it. It is a case of naked special agency governed by the principles applicable to that class of agencies. All persons dealing with such an agent are bound at their peril to inquire into the extent of his power and to understand its legal effect, and if the agent exceeds the limits of his authority, the act, so far as it affects the principal, is void. When the bond is in the possession of a stranger, there is nothing in the character of the agent, or in the custody of the instrument, calculated to mislead the obligee, in unduly accepting it.

On the contrary, the mere fact that a stranger having no apparent interest in the bond has possession of it is of itself sufficient to excite suspicion, and to put the obligee upon inquiry as to his authority to dispose of it. When, therefore, the obligors deliver the bond to a stranger as an escrow, it cannot be said they have done an act or made a declaration calculated to mislead third persons. The most that can be said is, they have appointed an agent who in making an undue delivery has exceeded his powers, but there is nothing in the manner of the appointment or the circumstances of the agency which prevents the principal from repudiating the act.

On the other hand, very different considerations, it seems to me, should govern where the surety signs a bond complete in all its forms and provisions, and intrusts it to the principal obligor for a proper delivery to the obligee. It is true the principal obligor has no greater power than the stranger to whose custody the bond is committed. But in such case the question is not, what is the power conferred, but what is the power the obligee has the right to suppose is conferred. The principal obligor has certainly an apparent authority to deliver the instrument in its then existing form and condition, — that is such an authority as may be fairly inferred from his connection with and possession of the paper. The reasonable presumption is, that he is to dispose of the bond according to the natural course of proceeding in such cases, — that is by a delivery to the obligee. It is true the agency is a special one, but the agent being clothed with the indicia of agency for the general purpose of delivery, no secret limitations or restrictions ought to control the exercise of the power so far as parties are concerned dealing with the agent upon the faith of the apparent power.

The instrument being complete in form, precisely such as would have been adopted if the parties signing it alone were to be bound, being found in the possession of the very person who would have held it, if the purpose had been to make an unconditional delivery, under such circumstances an obligee accepting it has the right to infer that the transaction is precisely what it purports to be, and that the real power is in fact coextensive with the apparent power.

In the language of an eminent author: "If the principal has justified the belief of persons dealing with his agent, that the agent had from him sufficient authority to do as agent the precise thing, it is no answer on his part to say that the agent had no authority, or one which did not reach so far, and that it was a mistake on the part of the third party. It may have been his mistake, but the question then is whether the principal led this third party into the mistake." 1 Parsons, 39. If the principal sends his

commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent there for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale; or if one send goods to an auction room can it be supposed that he sent them thither merely for safe custody? 2 Kent Com. 621. And so when the surety signs an obligation for the payment of money, and leaves it in the hands of him for whose benefit it was executed, is it to be presumed it was left there merely for safe custody? May it not be fairly inferred it was intended rather for delivery to the obligee? Is the latter to go farther, and take it for granted there are secret limitations upon this power of delivery never communicated to him?

When the surety signs his name to a bond, and confides it to the principal obligor, he thereby makes a solemn declaration that he has become a party to the instrument, and he so makes and shapes this declaration that it is almost absolutely certain to reach the party who is most likely to be misled by it. It would seem to be a gross violation of justice and good faith to permit the surety under such circumstances to repudiate these solemn declarations by setting up conditions and limitations known only to himself and his co-obligor.

In *Pickard* v. *Sears*, 6 A. & E. 469, Lord Denman said: "The rule of law is clear, that when one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things existing at the time."

And in *Lickbarrow* v. *Mason*, 2 Term R. 70, the same doctrine was expressed in a form very familiar to the profession, and that is, whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. The great principle of the law of estoppel is, that when an act is done or a statement made by a party which cannot be contradicted or contravened without fraud on his part and injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what would otherwise be mere evidence.

In the May No. of the Law Register, 1864 (p. 402), Judge Redfield uses the following language: "Where the surety intrusts the bond to the principal obligor in perfect form with his own name attached as surety, and nothing upon the face of the paper to indicate that others are expected to sign the instrument in order to give it full validity against all the parties, he makes such principal his agent to deliver the same to the obligee, because such is the natural and ordinary course of conducting such transactions; and if the principal under such circumstances gives any assurances to the surety in regard to procuring other co-sureties, or performing any other condition before he delivers the bond, and which he fails to perform, the surety, giving confidence to such assurances, must stand the hazard of their performance, and he cannot implicate the obligee in any responsibility in the matter, unless he is guilty of fraud or rashness in accepting the security."

These just and sensible observations are sustained by a number of well considered cases in the American courts: *Smith* v. *Moberly*, 10 B. Monroe, 266; *Millett* v. *Parker*, 2 Metc. (Ky.) 608; *Deardorff et als.* v. *Foresman*,

24 Indiana, 481; *State* v. *Pepper*, 31 Indiana, 76; *Passumpsic Bank* v. *Goss*, 31 Ver. 318; *State* v. *Peck*, 53 Maine, 284.

I refer especially to the case of *Deardorff et als.* v. *Foresman*, 24 Ind. 481, and *State* v. *Peck*, as containing an exhaustive review of all the authorities bearing upon the question.

It must be admitted there are contrary decisions in the course of other states, among them that of *The People* v. *Bostwick*, 32 New York, 445; *State Bank* v. *Evans*, 3 J. S. Green (N. J.), 155.

Upon a careful examination it will be found that in a large majority of the cases relied on to sustain the opposing view, it appeared that the obligee either had notice of the condition attached to the execution and delivery of the bond by the surety, or there was something in the transaction or on the face of the instrument to put him upon inquiry, or the obligee had not sustained any damage or loss, nor done any act to his own prejudice upon the faith of the instrument. *Pawling* v. *United States*, 4 Cranch, 219; *Wells* v. *Dill*, 1 Martin (N. S.), 592; *Bibb* v. *Reid*, 3 Ala. 88; *King* v. *Smith*, 2 Leigh, 157.

In Virginia this question has never been the subject of adjudication by any court of the last resort. In *Ward et als.* v. *Churn*, 18 Grattan, 801, this court held that an instrument which on its face indicates that it is not complete, and that other persons are intended to sign it, is not binding upon those who do sign it, although the condition may not have been known to the obligee when it was delivered to him. But the court declined to express any opinion upon the effect of an instrument which is apparently complete, and which in no manner indicates that it is to be signed by others. In the course of his opinion, Judge Joynes adverted to this question and to the conflict of authority upon it, but he said its decision was not necessary to the case before the court. In *Preston* v. *Hull*, recently decided by this court, the instrument was imperfect and incomplete on its face when exhibited to Hull, in the fact that the name of no obligee had been inserted. And this court held that the blank could not be filled by an agent appointed by parol, and then delivered in the absence of the principal as a deed. It is clear that the doctrine of estoppel could have no application to the case.

Amid this conflict of authorities in other states, and in the absence of any express adjudication by this court, we are at liberty to adopt that rule which seems best to accord with sound policy and well established general principles of law.

In this State it is believed to have been the general practice and usage for parties executing bonds as sureties to leave them in the possession of the principal obligor for delivery to the obligee. Until very recently no serious question has ever been raised as to their liability, whatever may have been the conditions imposed, unless indeed there was something apparent on the face of the instrument calculated to excite suspicion or inquiry.

It is impossible to foresee the mischief of establishing a different rule. An obligee having in his possession an instrument signed by responsible parties, to all appearances perfectly complete and valid, may at any distance of time be confronted and defeated by a secret parol agreement between the principal obligor and some one of the sureties, of the existence

of which he had not even a suspicion. How is it possible to provide against these pretended agreements? How are they to be met and disproved? In the nature of things, the obligee can offer no evidence besides the bond, as a knowledge of the condition is generally confined to the principal obligor and the sureties.

It is a fundamental principle of the common law that parol testimony is not admissible to vary or contradict a written agreement. In this case it is proposed to receive such testimony in its most objectionable form, by proof of a parol contract between the parties on one side never communicated to the party on the other most interested in knowing it.

It has been said that the obligee may protect himself by requiring the personal acknowledgment of each one of the obligors.

Apart from the inconvenience of such a rule, it is by no means certain that an acknowledgment of that kind will furnish the necessary security. After a great lapse of time it would be as difficult to prove the acknowledgment as the original execution, unless indeed some independent proof of such acknowledgment shall always be preserved along with the bond.

On the other hand, nothing can be easier than for the surety to incorporate in the writing or indorse upon the paper the condition upon which his signature is obtained, or he may commit it to the custody of a third person in no manner connected with the transaction. This would furnish ample protection to the surety, and constitute sufficient notice to the obligee. In the absence of some plain and obvious precaution of this sort, I think the parties, whose names are attached to the instrument, should be estopped to deny, as against the obligee, that it is their deed.

Since the foregoing opinion was written, the 16th vol. of Wallace's Reports has been published, containing the case of *Dair* v. *United States*, page 1.

That case is identical with this, the surety having signed the bond on condition that it should not be delivered unless it was executed by other persons who did not execute it. But the obligee had no notice of the condition, and there was nothing to put him upon inquiry as to the manner of its execution. The supreme court of the United States held that the bond was nevertheless binding upon the sureties. Mr. Justice Davis, speaking for the court, said: "In the execution of the bond the sureties declared to all persons interested to know that they were parties to the covenant, and bound by it, and in the belief that this was so they were accepted and the license granted. They cannot therefore contravene the statement thus made and relied on without a fraud on their part and injury to another. And where these things concur, the estoppel is imposed by law. As they confided in Dair, it is more consonant with reason that they should suffer for his misconduct than the government, who was not placed in position of trust with regard to him."

It will be perceived that the supreme court rests its decision upon the doctrine of estoppel exclusively. And upon the same ground we are content to place the decision in this case.

It only remains to consider the question raised by the defendants' fifth instruction. This instruction asserts the proposition that if the bond was executed by all the defendants except Isaac Vermillion, and in that condition was delivered to and accepted by the obligee, but afterwards, with

the consent of the obligee and without the consent of the obligors, was executed by Vermillion, then it is not the bond of any of said obligors who did not know of said transaction and consent to it.

It will be observed that the obligation is joint and several. In this respect it is different from the bond in *Baber* v. *Cook*, 11 Leigh, 606, which was simply a joint obligation. In that case it was held that when a bond is executed by three persons and perfected by delivery, the sealing and delivery by another afterwards will not avoid the bond as to the others. In such case, the obligation as to the three first signing is joint as between themselves and several as it relates to the obligor last signing. And so in this case, if the fact be as assumed in the instruction, as between the parties first signing, the bond is joint and several, and as to Vermillion it is simply his several obligation. Whether the plaintiff will be entitled to a joint judgment against the obligors first executing the bond, and a several judgment against the last, or whether in this action he is barred of any remedy against Vermillion, and will be compelled to resort to a new suit against him, are questions in no manner before us, and which we are therefore not called upon to decide. *Moffett* v. *Bickle*, 21 Grattan, 280. We have only to deal with the instruction as it is, which for the reasons suggested is clearly erroneous and should not have been given.

This disposes of all the questions arising upon the pleas and the instructions. In the progress of the trial, evidence was adduced tending to show that at the time the bond was signed by a part of the obligors it was agreed that the signatures of twenty sureties should be obtained, and that there were then twenty seals or scrolls upon the paper, extending to the bottom of the page, whereas the bond as now exhibited by the plaintiff contains ten only. What would have been the effect of such evidence, offered under appropriate pleadings, it is unnecessary now to say.

The instructions given by the circuit judge are not based upon any hypothesis of an incomplete instrument, or an instrument which upon its face indicates that it is to be signed by others; but they cover the broader ground that the bond, though perfect in form and execution, was not valid and binding until the conditions were complied with, although these conditions were never communicated to the obligee, and nothing appeared on the face of the instrument to put him upon inquiry. The second, third, and fourth instructions clearly assert, and were no doubt intended to assert, this proposition, and in that aspect they have been argued by counsel and considered by this court. The first instruction is perhaps not objectionable, though of a somewhat vague and general character. Plea No. 2 affirms the same erroneous doctrine asserted in the instructions. Had it averred that the obligee was apprised of the condition at the time the bond was delivered to him, or that there were scrolls or seals upon the paper to which no signatures were attached at the time of such delivery, the plea would have presented an entirely different question for the consideration of the court and jury.

Pleas No. 1, 4, and 5 are general pleas of *non est factum*, to which there is no valid objection. But for the error in admitting plea No. 2, and giving the instructions before mentioned, the judgment of the circuit court must be reversed, and the case remanded for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1873.]

PATENT. — COMBINATION. — AGGREGATION OF PARTS. — GROUPING OF DEVICES.

HAILES v. *VAN WORMER.*

A combination cannot be the subject of a patent unless it produces a new result.
The mere grouping of devices which produces no new result is not a patentable combination. There must be a joint action of the constituent parts; not merely an aggregation of the single effects of each separate part.
"Substantially as described" construed.
The originality of the design is unimpeached.

MR. JUSTICE STRONG delivered the opinion of the court.

The bill of the complainant is founded upon two patents, for alleged improvements in base-burning stoves. Of these patents one is a reissue, dated February 3, 1863, and the other is an original, dated August 11, of the same year. The earliest asserts twelve claims, of which the first five only are charged to have been infringed by the defendants, and the second contains six claims, upon the first and second of which alone it is averred there has been any encroachment. The answer of the defendants denies both the novelty and the patentability of the inventions claimed, and it denies also the infringement charged in the bill.

The stove containing the improvements described in the patents held by the complainants, and that manufactured and sold by the defendants, belong alike to a class of stoves long known as "base-burners," or self-feeders, called such because they have a magazine or reservoir suspended above the fire-pot, which may be filled with coal at its upper extremity, and which, when filled, is closed by a cover. The lower end of the reservoir or feeder is left open, and as the coal in the fire-pot is consumed, that in the reservoir falls and supplies the place of that consumed, the combustion being only in the fire-pot, and not in the reservoir. Many such stoves had been made, and they were well known years before either of the complainants' patents was granted, and it is not claimed that, merely as base-burning stoves, they are within the monopoly of the patents. The inventions claimed are alleged improvements in the structure and arrangement of such stoves. They consist in what is described as a new combination of old and known devices, producing a new manufacture — namely, a stove uniting in itself all the advantages of a reservoir-stove, and those of a revertible draft-stove, which prevents the products of the combustion in the fire-pot from passing up, around, and over the reservoir, thereby heating the fuel therein, so as to expel its gases, and cause their explosion as well as their escape into the apartments where the stove may be placed. All the devices of which the alleged combination is made are confessedly old. No claim is made for any one of them singly, as an independent invention.

It must be conceded that a new combination, if it produces new and

useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. No one by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination, and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others in combination.

If, now, we examine the patents held by the complainants, looking first at the objects sought to be obtained by the combinations for which the patents were granted, they are, as described in the specification, first, to prevent the passage of the products of combustion up, around, and over the top of the coal-supply reservoir, so as to heat a surrounding jacket thereof; and, secondly, to heat a circulating or ascending body of air by means of radiated heat from the fire-pot, and at the same time to heat the base of the stove by means of direct heat circulating through descending flues which lead into the ash-pit, or around it, and to the smoke and draft flue. A third avowed object is to secure economy by retarding the fall of the coal into the fire-pot from the supply-reservoir, and by causing the flame to circulate outside of the contracted discharge of the reservoir, and around the upper edge of the fire-pot, and thence to descend around or under the base of the stove in its passage to the smoke and draft flue. Such are the avowed objects of the combination claimed to have been devised by the patentees, and their effects they assert to be husbanding the radiated heat, and using it for the purpose of warming the upper part of the stove and the room in which it is situated, as well as for heating air for warming rooms above, if desirable, and at the same time so confining the direct fire-heat, and keeping it in contact with the base portion of the stove, as to insure warming it to a comfortable degree. A second effect claimed is relief of the incandescent coal from the weight of the body of superincumbent coal, thus preventing the compression of the burning coal in the fire-pot, and securing for the flame free expansion, thus enabling it to act with greater heating effect upon the lower portion of the stove in its passage to the smoke and draft flue.

The combination employed to produce these effects consists of the following devices, among others: —

1. A flaring fire-pot supported by a base, the diameter of the pot being larger at the top than at the bottom.

2. A magazine or reservoir for supplying coal, located over the fire-pot, and having its lower end contracted.

3. Revertible passages or flues outside of the pot for the conduct of the products of combustion downward to the base of the stove, and thence to a main draft-flue leading thereout.

4. A direct draft for such stoves as are constructed with revertible flues, the direct draft being obtained by a flue passing out above the fire-pot, and provided with a damper to be closed after the fuel has been ignited.

5. Openings in the case or exterior of the stove and the insertion of mica therein, for the purpose of illuminating the room in which the stove may be with the light of the burning fuel.

These devices, *with others*, are brought together, and claimed as a new combination, and several combinations of some of them are also claimed as inventions producing novel and useful results. What those other devices are we need not specify, for it is not shown that they are employed by the defendants.

The stove of the defendants does, however, contain all those mentioned, and contains them in combination. That each of them was an old device, well known, and in public use before the patents of the complainants were granted is abundantly proved by the evidence submitted. A flaring fire-pot, a supply-reservoir, with its lower extremity of smaller diameter than its upper revertible flues, a place for flame expansion above the fire-pot, the addition of a direct draft for use in igniting the fuel, provided with a damper, and the insertion of mica for illumination-openings, were all found in stoves before Hailes and Treadwell claimed to have made their invention. It is true there is a peculiarity in the construction of the lower extremity of the complainants' supply-reservoir. It is provided with a circular flange, extending outward and bending downward, so as to fit upon the upper rim of the fire-pot, and thus form a closed combustion-chamber. This, of course, cuts off communication with the space around the upper part of the reservoir, and confines the flame and other products of combustion within a circular combustion-chamber thus formed, leaving no outlet for them except through ear-passages into revertible flues. For this device, the peculiar structure of the reservoir, and the formation of the closed expansion-chamber, there is no equivalent in the defendants' stove. There is no such closed chamber. The reservoir does not rest on the fire-pot. It has no connection with it, or with the sides of the stove. Nor is there any obstacle interposed to the passage of the products of combustion up and around the reservoir when the flue for direct draft is open; and when that flue is closed, the flame is not detained over the burning coal, but the products of combustion pass directly across the edge of the fire-pot, and descend along the sides thereof to the interior draft-passage. Such an arrangement is not fitted to produce the effects sought and claimed for the complainants' stoves. On the contrary, it plainly excludes them.

There are other differences in the devices used both in the complainants' and the defendants' stoves, which we think are substantial, and not merely formal. The combination claimed by the complainants passes the products of combustion out of the chamber through perforations in the flange, or through ears into flues leading downward, but wholly exterior to the fire-pot, and not in contact with it. This arrangement makes it possible to introduce external air through perforations in the outer casing of the stove, and allow it, when heated by contact with the fire-pot and the descending flues, to escape from the top. Accordingly, the outer casing is perforated, and there is no closed magazine around the fire-pot. But in

the defendants' stove there is no such device, and no such effects are produced. There are no external downward flues separated from the fire-pot. The whole space around the magazine and the fire-pot is completely inclosed. There is but a single chamber around the reservoir, over the surface of the burning coal, and around the fire-pot. Through this chamber the products of combustion pass, either through the direct draft-flue, when that is in use, or to the base of the stove, and thence outward. This arrangement also excludes the possibility of an effect claimed for the Hailes and Treadwell invention. It admits of no space around the fire-pot to which the external air can have access.

It is not, then, the combination of old devices which the defendants use that Hailes and Treadwell invented. It is not those old devices that produce the new results claimed. The complainants' combination is a different thing. It has a greater number of constituent elements. It consists in the employment of the devices used by the defendants, together with others they do not use, and the result of the entire combination is the production of a stove differing very materially from that of the defendants; and the defendants' combination cannot produce the results claimed for that of the complainants. We have said that the new results claimed, whatever they may be, are not the production of the combined devices common to both stoves. The devices used by the defendants produce no new effects, because used in combination. The space around the fire-pot leading to the base doubtless secures the beneficial results long known to follow the use of revertible flues. It may be conceded to be an equivalent for such flues; but the results of its construction are not changed by the fact that a flaring fire-pot and a supply-reservoir, with a contracted discharge-end and openings for illumination, are used in the same stove. It still operates to conduct the products of combustion to the base and into the exit-flue. No new operation is given to it by the combination. The same may be said of every other device employed by the defendants, which is also in the complainants' combination. Each produces its appropriate effect unchanged by the others. That effect has no relation to the combination; in no sense can it be called its product. Thus far nothing novel is produced. This, then, is a mere aggregation of devices, not invention, and consequently the use of those devices, either singly or together, cannot be held to be any infringement of rights belonging to the complainants.

We pass now to consider more in detail the claims in the complainants' patents, which it is alleged the defendants have infringed. The first in the reissued patent, dated February 3, 1863, is unquestionably too broad to be sustained, unless limited to the means described in the specification. So it was doubtless intended by the patentees to be limited, for the claim speaks of the combination claimed "substantially as described," that is, described in the specification. Thus limited, one of its essential elements is a closed combustion-chamber over the fire-pot, formed by a flange of the reservoir resting on the upper edge of the pot, and provided with perforations or ears connecting with two flues passing downward. This element is indispensable for the purposes asserted in the claim, as well as in the specification. And the peculiar structure of the chamber is more than formal. It is functional. It prevents the passage of the flame and other

products of combustion up, around, and over the supply-reservoir, which is a leading avowed object of the invention, precisely the improvements patented. But this constituent of the combination the defendants have never used, nor have they used any corresponding device, or device producing the same results.

The second claim is for contracting the discharge end of the coal-supply reservoir, expanding the fire-pot, and extending the flame-passage downward for united operation in a base-burning coal-supply reservoir stove or furnace, essentially as set forth. The means set forth for extending the flame-passage downward are perforations through the flange, forming the lateral boundary of the closed combustion-chamber, or ears leading thereout, and close flues extending from the ears or perforations downward at some distance from the fire-pot, through a space bounded on one side by the fire-pot, and on the other by an outer casing of the stove, perforated for the admission of external air. It might, perhaps, be questioned whether there is any device in the defendants' stove corresponding to this; but, waiving the consideration of that question, it is very evident that the combination of the three devices named is not the work of invention. They have no relation to each other. Neither the form of the feeder nor the shape of the fire-pot bears at all upon the direction of the draft-passages. There is no novel result flowing from the joint operation of the three devices. The revertible flues have no more to do with a stove supplied by a feeder than they would have with a stove supplied by hand. There is, therefore, nothing in this claim that interferes with what the defendants have done.

An essential element of the combinations mentioned in both the third and fourth claims is the closed combustion-chamber, formed in part by a circular flange extending outward and closing on the top of the fire-pot, with perforations in it, or ears for connection with the downward flues, or it is those perforations or ears leading out of such a chamber to the descending passages. These devices the defendants do not employ, and they cannot be used in the defendants' stove. There has been, therefore, no infringement of these claims.

The fifth claim is the only remaining one contained in the reissue which the defendants are alleged to have invaded. It is constructing the fire-pot of a base-burning stove with an imperforated circumference and in the form of a trumpet-mouth at its upper extremity, in combination with descending flame-passages, substantially as described, and for the purposes set forth. How in combination? As described in the specification, united by means of perforated flanges or ears of the pot, involving, of course, the presence of a closed combustion-chamber constructed substantially as already described. Construing the claim thus, as we think it must be construed, the defendants have been guilty of no infringement.

Passing now to the second patent, issued August 11, 1863, we observe that its first claim was for a combination of the illumination-openings, flame-expansion chamber, coal-supply reservoir, fire-pot, descending flue, and draft-flue, substantially in the manner and for the purpose described. In the main, this is the same combination as that claimed in the reissued patent we have had under consideration. The only change is the addition of illumination-openings. These were a well known device applied

to stoves long before either of the patents were granted. They perform no peculiar office in the new combination. They have no possible relation to it. They do not affect in the slightest degree the results of that combination, whatever they may be. It is impossible to regard the mere addition of such openings to a stove containing the improvements described in the reissued patent as the formation of a new patentable combination. It is not invention. If, however, it were, the defendants have not trespassed upon it, for of the combination the peculiarly formed close expansion-chamber is an essential constituent, and that is not found in the defendants' stove.

Similar remarks might be made respecting the second claim of the patent of August, the only remaining one alleged to have been infringed. All the elements of the combination have not been used by the defendants.

The decree of the circuit court is affirmed.

SUPREME COURT OF NEW HAMPSHIRE.

[52 N. H.]

CONSTRUCTION OF STATUTES. — PRESUMPTIONS AGAINST UNREASONBLE EXEMPTION. — GENERAL AND ESPECIAL LAWS. — INSURANCE.

DE LANCEY v. *INSURANCE CO.*

In the construction of a statute, it is to be presumed that the legislature did not intend to grant to a corporation such an exemption from the operation of the general law applicable to similar corporations as would create an unreasonble monopoly or immunity at variance with constitutional principles; and, when such an exemption is excluded by a fair construction implying the qualification that the statute is to operate in harmony with and subject to the general law, such a construction will be adopted.

Assumpsit, by Randolph A. De Lancey against the Rockingham Farmers' Mutual Fire Insurance Company, on a policy of insurance dated November 19, 1866, purporting to insure the plaintiff's house, clothing, and provisions. The facts in regard to the title of the house, and the land on which it stood, were as follows: Moses Hobbs died, seised in fee of the premises, some time before February 24, 1866, leaving a widow, Abby L. Hobbs; three brothers, Obed, Maurice, and James; and one sister, Abigail T. De Lancey, wife of the plaintiff, but no lineal descendants. His widow waived the provisions of the will, electing to take her share of the estate, with dower and homestead in lieu thereof; and the rights of the parties then stood as though there had been no will. February 24, 1866, Abby L., the widow, conveyed all her interest in the premises to her husband's three brothers and Mrs. De Lancey, jointly. April 6, 1866, Obed S. and Maurice conveyed their interest to the plaintiff. April 1, 1867, James conveyed his interest to the plaintiff. April 13, 1867, Mrs. De Lancey conveyed her interest to Elizabeth L. Hobbs; and April 30, 1867, Elizabeth L. Hobbs conveyed to the plaintiff. Sub-

ject to the defendants' exception, the plaintiff was permitted to testify that the deed from the widow of Moses Hobbs was made to the brothers and sister in pursuance of a previous understanding of all parties, at his own suggestion, and to avoid complication; that upon the execution of that deed he paid the grantor $1,700 in cash, being the agreed price of her interest, and that the subsequent deeds, passing the legal title to himself, were all executed in pursuance and execution of a verbal contract at that time entered into; and James Hobbs was permitted to testify that he bargained with the plaintiff to sell him his interest in his brother Moses's estate in February, 1866; that the first payment to him was made April 2, 1866, to clinch the bargain; and that $200 more was paid between that time and the last of September, 1865.

The defendants' charter provides that the directors may determine the sum to be insured on any building, not exceeding three fourths of its value. It was stipulated, in the application and policy, that the sums proposed to be insured did not exceed three fourths of the actual value of the buildings; and that the company should not be held liable to pay, in case of loss, more than three fourths of the value at the time of the loss. The value of the house, at the date of the policy, was $2,883.33; its estimated value was stated in the application to be $1,400; and the sum insured upon it was $1,050.

The other facts are stated in the decision.

Marston, for the plaintiff.

Small & Wiggin, for the defendants. I. The plaintiff, not having a title in fee simple unincumbered to the property insured, and not having stated his true title, his policy is void by the terms of section 3 of the amendment to the charter. The authorities upon this point are numerous and uniform. The following are some of them: *Marshall* v. *Col. M. F. Ins. Co.* 27 N. H. 157; *Leathers* v. *Farmers' M. F. Ins. Co.* 24 N. H. 259; *Patten* v. *Ins. Co.* 38 N. H. 338; *Smith* v. *Bowditch M. F. Ins. Co.* 6 Cush. 448; *Wilbur* v. *Bowditch M. F. Ins. Co.* 10 Cush. 446; *Falis* v. *Conway M. F. Ins. Co.* 7 Allen 46; *Towne* v. *Fitchburg M. F. Ins. Co.* 7 Allen 51; *Gahagan* v. *U. M. Ins. Co.* 43 N. H. 176. If the plaintiff had a valid contract for a conveyance, it would make no difference. See the preceding authorities. It does not satisfy the terms of the policy that he had a title in fee simple to a part. The insurance was procured upon the whole. *Wilbur* v. *Bowditch M. F. Ins. Co.*, before cited, is directly in point. The plaintiff never in fact had an unincumbered title to the land and buildings, having mortgaged them to raise the funds to complete the purchase, and the mortgage having been paid out of the funds received of the N. A. Ins. Co., as was evident from the papers in the case. The policy is void for the personal property as well as the buildings. *Friesmuth* v. *Agawam M. F. Ins. Co.* 10 Cush. 587; *Brown* v. *People's Mutual Ins. Co.* 11 Cush. 280. The misstatement of the title need not have been fraudulent to avoid the policy. See the preceding authorities, in all of which the principle is recognized, and in several expressly decided.

II. The policy is not saved by any statute. It is not affected by section 2, chapter 157 of the Gen. Stats., which provides "that no policy of insurance shall be avoided by reason of any mistake or misrepresentation,

unless it appears to have been intentionally and fraudulently made." Charters are generally subject to amendment, and may be amended as well by general laws as by particular acts, if the intention is clear; but no amendment of a charter can amend or alter the construction of a contract made before the charter was amended. The General Statutes took effect January 1, 1868; and the policy was made November 19, 1866. This section of the General Statutes originated in an act passed July 11, 1855, which contained similar provisions, though less broad in their application, the act of 1855 being confined to cases where applications were made to agents, and the General Statutes applying to all policies. If there is any conflict between the act of 1855 and the act in amendment of the charter, the act in amendment must prevail. Both derive their authority from the same source, and the act in amendment was passed at a later date, namely, June 19, 1862. *Brown* v. *Lowell*, 8 Met. 172; *Fales* v. *Whiting*, 7 Pick. 225. If both are to be construed together as parts of one act, the special act would modify the General Statutes, and not the General Statutes the special act. Ordinarily, specific legislation supersedes general statutes upon the particular subject of its enactment. *Ellis* v. *Swanzey*, 26 N. H. 266; *Titcomb* v. *Union M. & F. Ins. Co.* 8 Mass. 326. A general statute does not repeal a special prior act, unless the intent is clear. *Brown* v. *Lowell*, before cited; *Tracy* v. *Goodwin*, 5 Allen, 409.

The construction that a misrepresentation of title must be fraudulent to avoid a policy under section 3 of the amendment, where the application was taken by an agent, would render it practically a nullity. A fraudulent misrepresentation always avoided a policy, and, if there had been any doubt on the subject before, it is made certain by the act of 1855 by plain implication. It is a matter within everybody's knowledge, that nearly every application for insurance in home companies is made through the local agents, whose appointment is regulated by the same act of 1855; and if misstatements of title, when made to them, must have been fraudulent to avoid a policy under this section, it could have no operation except in the rare cases where the application was made directly to the directors or secretary, and it would be very difficult to conjecture any reason why a misstatement of title to them should involve any different consequences from a misstatement to an agent.

There is no repugnancy between the act of 1855 and this section of the defendants' charter, when the true intent and purpose of each are kept in view. The charter does not contemplate that they should have any capital. It provides for borrowing to meet their losses, to save the labor and expense of too frequent assessments. Security to the assured who meet with losses, and justice to all the members, require that the company have security from each member for the payment of his assessment; and the amendment of June 19, 1862, was enacted for the specific purpose of providing such security by lien on the property insured. To make the lien effectual to give such security, the assured must have a title to the property insured, and if he have an interest sufficient to satisfy the lien, the company should know what it is; otherwise, the expense of an investigation to ascertain what it is might exceed the assessment, and render the lien of no value practically. The amendment is remedial, and should be liberally construed to suppress the mischief and advance the remedy. A

misstatement of title without fraud would impair the security by lien just as much as a fraudulent misrepresentation. The statute of 1855 was enacted for a very different purpose. Prior to that statute, a misrepresentation material to the risk, though not fraudulent, avoided a policy. The consequences of this rule were often highly penal. Where the application was made to a local agent, who was, or could make himself, fully acquainted with the risk, and upon whose judgment it was probably taken, it might be very unjust that an inadvertent misstatement of facts, open to the observation of the agent, should render the policy void. The wording of the section in the General Statutes, which is substantially a reënactment of the act of 1855, renders it clear that the mistakes and misrepresentation intended are such as affect the risk. The jury are to reduce the amount as much as the premiums should have been increased. The state of the title has nothing to do with the risk, except so far as it may induce design or negligence on the part of the assured. The title is also peculiarly within the knowledge of the applicant. See, upon this point, *Campbell* v. *M. & F. Ins. Co.* 37 N. H. 35.

The misstatement of the title was not a mistake. The plaintiff does not claim that the application does not contain a correct statement of what he said about his title, when it states that the land and buildings were his, and unincumbered, nor that he was under the influence of any error as to what his true title was, but says the misstatement was inadvertent. It was not a misrepresentation merely, as that term is understood in insurance law, but the truth of the statements was made an express condition by the terms of the policy. *Boardman* v. *N. H. Mut. Fire Ins. Co.* 20 N. H. 551. Prior to the statute of 1855, the law raised an implied condition that every material representation should be true; and if any were false, the policy was made void. The statute does away with these implied conditions, unless the misrepresentation is intentional, but does not attempt to change the effect of express conditions or warranties.

III. If, as matter of law, the defendants' charter is modified by the act of 1855, or any other statute, the plaintiff has waived the benefit of any such modification by entering into a contract to be bound by the terms and conditions of the charter as it stands. The policy provides that said company doth promise and agree to insure the plaintiff, "subject to the provisions and conditions of the charter and by-laws of said corporation hereto annexed." This makes the annexed charter and by-laws a part of the contract, just the same as if written in it. *Marshall* v. *Columbian Mut. Fire Ins. Co.* 27 N. H. 157, before cited, and authorities there cited. The question is, then, not what would be the legal rights and obligations of members of the company in the absence of any contract, but what is the construction of the charter and by-laws annexed to the policy, and making a part of it, as a matter of contract? The act of 1855 does not make any contract of the parties illegal. It simply declares the effect upon the contract of mistakes and misrepresentations made when the contract is entered into. It does not prohibit the parties from making a contract, that the effect of such mistakes and misrepresentations shall be different from that declared by the act to be the effect in the absence of such a contract. The party may release the legal liability of the company, as he might the legal liability of a com-

mon carrier, by express contract. *Aliquis renunciare potest juri pro se introducto.* The language of the charter cannot be misunderstood. "Policies shall be void unless the true title of the assured, and the incumbrances on the same, be expressed therein." "The law frequently supplies by its implications the want of express agreements between the parties, but it never overcomes by its implications the express provisions of the parties. If these are illegal, the law avoids them. If they are legal, it yields to them, and does not put in their stead what it would have put by implication, if the parties had been silent." 2 Par. on Con. 27 (2d ed.).

Doe, J. In the application for insurance, signed by the plaintiff, he is made to say, among many of the things, and in the kind of print extremely difficult to be read, usually found in such documents, that he covenants and agrees that the description of the property in the application is correct, so far as regards its condition, situation, value, and risk; that the misrepresentation or suppression of material facts, in the application, shall destroy his claim for a damage or loss; and that he holds himself bound by the charter and by-laws of the company. The policy, after reciting, in diminutive type, in long and compact lines, that he has entered into the numerous stipulations of the application, "which is made a part of this policy," goes on to declare, in type of good size, well spaced, and set in a legible manner, that the company, in consideration of the premises, promises to insure, subject to the provisions and conditions of the charter and by-laws "hereto annexed." Annexed to the policy, in the typographic style commonly used for the suppression of information, are copies of the defendants' act of incorporation, passed in 1833, an act in addition to that act, passed in 1862, and the by-laws.

The third section of the amendatory act of 1862 (ch. 2685) provides that "any policy of insurance issued by said company, signed by the president, and countersigned by the secretary, shall be deemed valid and binding on said company in all cases where the assured has a title in fee simple, unincumbered, to the building, buildings, or property insured, and to the land covered by said buildings; but if the assured have a less estate therein, or if the property or premises are incumbered, policies shall be void, unless the true title of the assured, and the incumbrances on the same, be expressed therein." In the application, the plaintiff was represented as stating that the house upon which he desired insurance was his property, and was not incumbered, when he had an absolute legal title, not to the whole of the house and land covered by the house, but only to part thereof as tenant in common. The sixth section of the act of 1855 (ch. 1662), entitled "An act in relation to insurance companies," provides that no such policy as the plaintiff's "shall be void by reason of any error, mistake, or misrepresentation, unless it shall appear to have been intentionally and fraudulently made; but said company may, in any action brought against them on said policy, file in offset any claim for damages which they shall have actually suffered thereby; and the jury may deduct, from the claims of the plaintiff, the amount of said damage, as they shall find it." The plaintiff's misrepresentation of title was not "intentionally and fraudulently made;" and he claims that his policy is valid by force of the sixth section of the general act of 1855:

while the defendants claim that the policy is void on the ground that, in cases where the assured has a less estate in the buildings insured and the land covered by the buildings than a fee simple, unincumbered, and the true title of the assured and the incumbrances are not expressed in the policy, this particular insurance company is relieved from the obligation of the sixth section of the general act of 1855, by the third section of the private act of 1862, amending its charter.

The situation of the title was such, that, if the plaintiff was not a lawyer, or a man specially versed in the legal technicalities of real estate titles, he might well have called the real as well as the personal property his, as he did when he signed the paper called an application. His "error, mistake, or misrepresentation" does not "appear to have been intentionally and fraudulently made." The case is clearly one of the class which the general act of 1855 was intended to reach; and the plaintiff's policy is valid by force of that act, unless these defendants were singled out, among all the insurance companies of the State, as worthy of being invested with the exclusive privilege of exemption from the operation of the general act, by the special act of 1852. Does the true construction of the latter act entitle the defendants to such an exemption?

The nature of the mischief intended to be remedied by the act of 1855 has a bearing upon the question whether, by a fair and reasonable construction, it appears that the legislature, having in 1855 forbidden all insurance companies to commit such mischief, did actually intend in 1862 to confer on this company the exceptional legal right to commit the same mischief. The object of the act of 1855 obviously was to remedy an evil with which the people of this State had long believed themselves to be grievously afflicted. Whether their belief had an ample or substantial foundation, or any foundation at all; whether it was justified by the conduct of a considerable number of insurance companies; or whether the course of a very few brought an undeserved reproach upon the whole system of insurance, it is not now necessary to inquire. It is the state of things believed to exist, and not its real existence, that explains the legislation. The public belief, manifested in the annals of litigation and elsewhere, is too notorious and historic to require any specific attestation. The state of things believed to exist was this: —

Some companies, chartered by the legislature as insurance companies, were organized for the purpose of providing one or two of their officers, at head-quarters, with lucrative employment, — large compensation for light work, — not for the purpose of insuring property; for the payment of expenses, not of losses. Whether a so-called insurance company was originally started for the purpose of insuring an easily earned income to one or two individuals, or whether it came to that end after a time, the ultimate evil was the same. Names of men of high standing were necessary to represent directors. The directorship, like the rest of the institution and its operations, except the collection of premiums and the division of the same among the collectors, was nominal. Men of eminent respectability were induced to lend their names for the official benefit of a concern of which they knew and were expected to know nothing, but which was represented to them as highly advantageous to the public. There was

no stock, no investment of capital, no individual liability, no official responsibility, — nothing but a formal organization for the collection of premiums, and their appropriation as compensation for the services of its operators.

The principal act of precaution was to guard the company against liability for losses. Forms of applications and policies (like those used in this case), of a most complicated and elaborate structure, were prepared, and filled with covenants, exceptions, stipulations, provisos, rules, regulations, and conditions, rendering the policy void in a great number of contingencies. These provisions were of such bulk and character that they would not be understood by men in general, even if subjected to a careful and laborious study: by men in general they were sure not to be studied at all. The study of them was rendered particularly unattractive, by a profuse intermixture of discourses on subjects in which a premium payer would have no interest. The compound, if read by him, would, unless he were an extraordinary man, be an inexplicable riddle, a mere flood of darkness and confusion. Some of the most material stipulations were concealed in a mass of rubbish, on the back side of the policy and the following page, where few would expect to find anything more than a dull appendix, and where scarcely any one would think of looking for information so important as that the company claimed a special exemption from the operation of the general law of the land relating to the only business in which the company professed to be engaged. As if it were feared that, notwithstanding these discouraging circumstances, some extremely eccentric person might attempt to examine and understand the meaning of the involved and intricate net in which he was to be entangled, it was printed in such small type, and in lines so long and so crowded, that the perusal of it was made physically difficult, painful, and injurious. Seldom has the art of typography been so successfully diverted from the diffusion of knowledge to the suppression of it. There was ground for the premium payer to argue that the print alone was evidence, competent to be submitted to a jury, of a fraudulent plot. It was not a little remarkable that a method of doing business not designed to impose upon, mislead, and deceive him by hiding the truth, practically concealing and misrepresenting the facts, and depriving him of all knowledge of what he was concerned to know, should happen to be so admirably adapted to that purpose. As a contrivance for keeping out of sight the dangers created by the agents of the nominal corporation, the system displayed a degree of cultivated ingenuity, which, if it had been exercised in any useful calling, would have merited the strongest commendation.

Travelling agents were necessary to apprise people of their opportunities, and induce them to act as policy holders and premium payers, under the name of "the insured." Such emissaries were sent out. "The soliciting agents of insurance companies swarm through the country, plying the inexperienced and unwary, who are ignorant of the principles of insurance law, and unlearned in the distinctions that are drawn between legal and equitable estates." *Combs* v. *Hannibal Savings and Ins. Co.* 43 Mo. 148, 152; 6 Western Insurance Review, 467, 529. The agents made personal and ardent application to people to accept policies, and prevailed upon large numbers to sign papers (represented to be mere matters of form)

falsifying an important fact by declaring that they made application for policies, reversing the first material step in the negotiation. An insurance company by its agent making assiduous application to an individual to make application to the company for a policy, was a sample of the crookedness characteristic of the whole business.

When a premium payer met with a loss, and called for the payment promised in the policy which he had accepted upon the most zealous solicitation, he was surprised to find that the voluminous, unread, and unexplained papers had been so printed at head-quarters, and so filled out by the agents of the company, as to show that he had applied for the policy. This, however, was the least of his surprises. He was informed that he had not only obtained the policy on his own application, but had obtained it by a series of representations (of which he had not the slightest conception), and had solemnly bound himself by a general assortment of covenants and warranties (of which he was unconscious), the number of which was equalled only by their variety, and the variety of which was equalled only by their supposed capacity to defeat every claim that could be made upon the company for the performance of its part of the contract. He was further informed that he had succeeded in his application by the falsehood and fraud of his representations, — the omission and misstatement of facts which he had expressly covenanted truthfully to disclose. Knowing well that the application was made to him, and that he had been cajoled by the skilful arts of an importunate agent into the acceptance of the policy and the signing of some paper or other, with as little understanding of their effect as if they had been printed in an unknown and untranslated tongue, he might well be astonished at the inverted application, and the strange multitude of fatal representations and ruinous covenants. But when he had time to realize his situation, — had heard the evidence of his having beset the invisible company, and obtained the policy by just such means as those by which he knew he had been induced to accept it, and listened to the proof of his obtaining it by treachery and guile, in pursuance of a premeditated scheme of fraud, with intent to swindle the company in regard to a lien for assessments, or some other matter of theoretical materiality, he was measurably prepared for the next regular charge of having burned his own property.

With increased experience came a constant expansion of precautionary measures on the part of the companies. When the court held (*Marshall* v. *C. M. F. I. Co.* 27 N. H. 157; *Campbell* v. *M. & F. M. F. I. Co.* 37 N. H. 35; *Clark* v. *U. M. F. I. Co.* 40 N. H. 333) that the agent's knowledge of facts not stated in the application was the company's knowledge, and that an unintentional omission or misrepresentation of facts known to the company would not invalidate the policy, the companies, by their agents, issued new editions of applications and policies, containing additional stipulations, to the effect that their agents were not their agents, but were the agents of the premium payers; that the latter were alone responsible for the correctness of the applications; and that the companies were not bound by any knowledge, statements, or acts of any agent, not contained in the application. As the companies' agents filled the blanks to suit themselves, and were in that matter necessarily trusted by themselves and by the premium payers, the confidence which they

reposed in themselves was not likely to be abused by the insertion in the applications of any unnecessary evidence of their own knowledge of anything, or their own representations, or their dictation and management of the entire contract on both sides. Before that era, it had been understoood that a corporation — an artificial being, invisible, intangible, and existing only in contemplation of law — was capable of acting only by agents. But corporations, pretending to act without agents, exhibited the novel phenomena of anomalous and nondescript as well as imaginary beings, with no visible principal or authorized representative; no attribute of personality subject to any law, or bound by any obligation; and no other evidence of a practical, legal, physical, or psychological existence than the collection of premiums and assessments. The increasing number of stipulations and covenants, secreted in the usual manner, not being understood by the premium payer until his property was burned, people were as easily beguiled into one edition as another, until at last they were made to formally contract with a phantom that carried on business to the limited extent of absorbing cash received by certain persons who were not its agents.

When it was believed that things had come to this pass, the legislature thought it time to regulate the business in such a manner that it should have some title to the name of insurance, and some appearance of fair dealing; and the act of 1855 was passed for that purpose.

The loss of the time occupied by the solicitations of insurance agents, the loss of premiums and assessments paid, the loss of insurance security, the vexation and costs of lawsuits lost upon the astute and technical character of applications and policies not understood by the premium payers, the manner in which innocent and deluded persons were overwhelmed by an array of their theoretical misrepresentations and constructive frauds, and other misfortunes incident to the system, were believed to constitute a crying evil, and a mischief of great magnitude. (Whether any remedy was available at common law or in equity, upon higher grounds and broader views than were taken — *U. M. L. Ins. Co.* v. *Wilkinson*, and note on that case in 11 Am. Law Reg. (N. S.) 485 — we need not, in this construction of statutes, stop to consider.) When the premium payer complained that he had been defrauded, it was not, in the opinion of the legislature, a sufficient answer to say that, if he had been wise enough, taken time enough, had good eyes enough, and been reckless enough in the use of them to read the mass of fine print, and had been scholar, business man, and lawyer enough to understand its full force and effect, he would have been alarmed, and would not have been decoyed into the trap that was set for him. Men have a right to be dealt with with some regard for the state of mind and body, of knowledge and business, in which they are known actually to exist. Whether they ought to be what they are, or not, the fact is, that, in the present condition of society, men in general cannot read and understand these insurance documents. Whether it be reliance upon the representations of the companies' agents, or want of taste for literary pursuits and critical exegesis, or defect of legal attainments, or press of business, or fatigue of daily labor, or dislike of insurance typography, — whatever the cause may be, the fact is, that, under the ordinary circumstances of the present

order of things, these documents are illegible and unintelligible to the generality of mankind. And it seemed to the legislature that the companies who sent out their agents, knowing they would be confided in by the premium payers to transact the business properly, and who issued applications and policies which they knew would not be understood, should not take an unfair advantage of mistakes into which the companies themselves, by their agents and their fine print, caused the premium payers to innocently and unconsciously fall. The action of the legislature was certainly in harmony with, if, indeed, it was anything more than an affirmance of, the common law (in relation to fraud, estoppel, and trust), which will not hear a man complain that he has led his neighbor into a pit. It was also thought that insurance companies, in danger of being defrauded by the premium payer's burning his own property, were required, by their private interest and their public duty, to see to it that they did not insure his property to such an amount as to lead him into temptation; and that their devices were not a prevention of, nor an appropriate protection against, the fraudulent incendiarism propagated throughout the country by excessive amounts of pretended insurance.

As the distress of those who met with losses was not alleviated by the eminent respectability of the men whose names figured as officers of the companies, so it was the nature of a system so liable to abuse, and not the character of the nominal or real managers of the companies, that was supposed to call for the interference of the legislature. With no fault in many, and probably with substantial fault in but a few, the system came to be excessively odious; it was believed there had seldom been so flagrant an abuse of corporate power.

The act of 1855 cut up a considerable part of the supposed evil by the roots. Upon a full trial of the remedy, from 1855 to 1862, it seemed to answer the high expectations that had been formed of it, and was perfectly satisfactory to the people of the State. In this state of things the defendants claim that, by the special act of 1862, in addition to the defendants' charter, the legislature abolished the remedy, not generally, in favor of all insurance companies, but by an exception in favor of this company alone, leaving the public securely guarded against all other companies, and giving to this company alone the legal right to take advantage of an innocent mistake, which right (if it ever existed) the legislature had taken away from this company and all other companies seven years before. It is not to be presumed that the legislature, of their own motion, passed the act of 1862 in ignorance of its tenor and practical effect, or that this company fraudulently procured its passage. No reason is suggested to show why the legislature should revive the evil which they had explicitly abolished — abolish the remedy which was thought to be perfectly indispensable, and, after a thorough trial of seven years' duration, had been found perfectly successful — and give this company a monopoly of insurance fraud. What great and conspicuous benefits these defendants had conferred upon the State; what enormous and exceptional service this particular company was to render the public over and above all other companies engaged in the same business; in what respect it was so peculiar an institution as to be selected for distinguishing marks of public favor,

and loaded with the bounty and perpetual pension and franchise of defrauding the whole community, — on this subject, history, as well as the act of 1862, is silent, and conjecture fails. Until some explanation is given, the presumption must be almost irresistible that the legislature did not do what the defendants claim they did.

It is not for the court to legislate by construing an act to be what they think it ought to be; but, in ascertaining the meaning of the act of 1862, by the settled rules of construction, it is our duty to give due weight to the history of all the legislation on the subject matter of the act, and the reason and policy of the general law of the land, in connection with which the special act of 1862 is to operate. The presumption which we have found, arising upon considerations of this kind, is not absolutely irresistible and conclusive, because it would be possible for the legislature to use language sufficiently explicit to leave no room for doubt of their intent to do what the defendants claim they did. If the legislature had passed a general act, saying, in so many words, "The act of 1855, chapter 1662, is hereby repealed," there would have been no question what that meant. If, instead of a general act of that kind, there had been a special act, explicitly declaring that policies issued by this company should be void by reason of innocent mistakes of the premium payers, and that this company should be exempted from the operation of the sixth section of the act of 1855, we might be compelled to admit that the legislature intended not only to expose the community to an unnecessary danger of fraud, but also to violate those principles of free government which require laws, as far as practicable, to be general, equal, and uniform, and prohibit unjust discriminations and monopolies.

It is not claimed that the general act of 1855 was repealed, but it is claimed that this company was exempted from the operation of the sixth section of that act. The general drift of the Constitution is distinctly hostile to the creation of discriminating and unreasonable privileges and immunities; the declaration of Article X of the Bill of Rights, that government is instituted for the common benefit, protection, and security of the whole community, and not for the private interest or emolument of any one man, family, or class of men, is plain and explicit: and the declaration of Article XXXVI, that a pension should be granted with great caution, and only in consideration of actual services, and never for more than one year at a time, is very significant. And it is difficult to over-estimate the weight of the natural presumption that the legislature did not intend either to pass an act that would be void, because evidently a breach of constitutional obligations, or to pass one that would so far indirectly defy the general spirit of the paramount law, — though not in direct, open, and violent conflict with any of its specific provisions, — as to be of doubtful validity. It is always to be presumed — and the presumption is to stand until the contrary is shown by an immense preponderance of evidence — that the legislature have not intended to disregard the doctrine of equal rights, upon which our institutions were founded. Whether every possible application of that doctrine is guaranteed in express terms in the Constitution, or whether some applications of it are necessarily to be inferred from the general tone and temper of that instrument, and its comprehensive declarations of the doctrine, it is extremely improbable that a legislature,

presumed to be well affected to free institutions in theory and practice, have intended, by an application of the doctrine of unequal rights, to build on some other foundation than that laid by competent authority.

It would be a serious misfortune if, by construing the Constitution strictly in its general direction, and liberally in other directions, or by adopting any arbitrary rule or eccentric habit of construction, it were rendered necessary to constantly amend the Constitution by inserting such specific guarantees as would be, in fact, mere applications of the general principles of the original instrument to changed circumstances and new conditions of society. Such a custom of amendment would propagate erroneous ideas of the original, break the uniformity and shake the permanency of its principles, and materially impair its efficacy. If the court should hold that the legislature intended to make unreasonable discriminations and to establish unreasonable franchises, not for the common benefit, protection, and security of the whole community, but for the private interest or emolument of some one man, family, or class of men, and should further hold that the legislature had the power to do this, in any case not within the condemnation of some constitutional provision more explicit than Article X of the Bill of Rights, the government would be turned into a course not designed by its founders. Standing on the presumption of a legislative intent to support the spirit as well as the letter of the Constitution, the court is not justified in holding, upon any light grounds, that the legislature have carelessly, unintelligently, or in bad faith, discharged the duty forcibly called to their attention by their official oath; and when a statute is fairly and reasonably capable of a construction consistent with the doctrines of the Constitution, it must ordinarily, if not always, be the duty of the court to give it that construction.

Upon a just consideration of the province of construction as the discovery of the legislative intent, the history of legislation on the subject matter of the third section of the private act of 1862, the reason and policy of the general act of 1855, the mischief which the act of 1855 was designed to remedy, and the presumption that the legislature passed the act of 1862 with a becoming regard for constitutional principles, the defendants' construction of that act is extremely unreasonable. A different construction must be very unreasonable indeed to prevent its being adopted in preference to the defendants'.

The title of the act of 1862 is, "An act in addition to an act to incorporate the Rockingham Farmers' Mutual Fire Insurance Company," — not a word indicating a purpose to amend the act of 1855, entitled "An act in relation to insurance companies," but every word indicating a purpose to amend the charter of this company, passed in 1833. A material modification of or exception to the general law would naturally be put in a general act, and not in a private one, which would not be likely to be published in revisions of the statutes. An important amendment of a general act inserted in a private one, with nothing in the title of the latter suggesting the amendment, is not according to the usual course of legislation in this State. Not only is there nothing in the title of the act of 1862 suggesting an amendment of the act of 1855, but in the body of the former act there is no allusion to the latter; and, from a perusal of the private act alone, no one would suspect that it modified, or introduced an

exception to, any general act whatever. If the legislature had intended, by the private act, to make so serious a change in the general law of insurance as to exempt one insurance company from its operation, there is some reason to expect they would have explicitly referred to the general law, or used, in the title or body of the private act, some express words of exemption or exception. But, while the seventh section of the amendatory act is, "The fifth and seventh sections of the act to which this is in addition are hereby repealed," the general clause repealing all acts and parts of acts inconsistent with this act, which clause was inserted in the act of 1855, and is usually inserted in all acts supposed to be repugnant to existing statutes not particularly repealed, was omitted in the act of 1862.

The third section of the act of 1862 is a substitute for the repealed seventh section of the charter, which provided "that the said company may make insurance for any term not exceeding seven years; and any policy of insurance issued by said company, signed by the president, and countersigned by the secretary, shall be deemed binding on said company in all cases."

The third section of the act of 1862 provides "that said company may make insurance for any term not exceeding seven years; and any policy of insurance issued by said company, signed by the president, and countersigned by the secretary, shall be deemed valid and binding on said company in all cases where the assured has a title, in fee simple, unincumbered, to the building, buildings, or property insured, and to the land covered by said buildings; but if the assured have a less estate therein, or if the property or premises are incumbered, policies shall be void, unless the true title of the assured, and the incumbrances on the same, be expressed therein."

A literal construction of the repealed section would have made every policy "binding on said company," that had been "issued by said company, signed by the president, and countersigned by the secretary." A literal construction of the substituted section would make every such policy "valid and binding on said company," where the title of the assured is "in fee simple, unincumbered." No construction could be more unreasonable or more unacceptable to the defendants than that. There were many cases where policies "issued by said company, signed by the president, and countersigned by the secretary," would have been void under the repealed section; and there are many cases where such policies would now be void under the substituted section, even if the title of the assured were "in fee simple, unincumbered." The literal construction of either section is wholly inadmissible. The repealed section would be held to operate in harmony with and in subjection to the general law applicable to duly executed policies of insurance. Such a qualification was necessarily implied and understood. And, to a great extent, the defendants would of course claim that the substituted section should be taken with the same qualification. But the defendants claim that no such qualification can be attached to the express provision that policies shall be void when the assured has a less estate than a fee simple, unincumbered, unless his true title is expressed in the policy; and it is argued that such a qualification would render that provision nearly a nullity, and would con-

flict with the purpose of the lien (given by the preceding section) on the property insured, for assessments. Forcibly as the defendants' argument is presented, it seems to us to be overcome by the reasons for the contrary conclusion, which we have considered. Due weight being given to all the reasons on both sides of the question, the qualification, necessarily implied in the repealed section, making policies valid, not in all cases, according to the literal terms of that section, but in all cases where duly executed policies would be valid by the general law, — which qualification is also necessarily implied in the substituted section "in all cases where the assured has a title in fee simple, unincumbered," — must, we think, also be implied in the latter section, in cases where the assured has not such a title. The implied qualification is in the repealed section and in the substituted section; and, on the grounds already stated, we think it must be held to apply to all cases under the latter section, as it applied to all cases under the former.

This construction undoubtedly leaves the substituted section open to the criticism of not being a very felicitous composition, or a very important amendment; but the opposite construction would expose it to objections far more serious than infelicity of style and immateriality of substance. A literal construction makes the act of 1862 repugnant to the act of 1855; but the repugnancy is removed by applying to all cases the qualification which must be applied to many cases; and it is much easier thus to remove the repugnancy than to remove the objections to the construction which raises it.

The defendants further claim, that the act of 1862 being made a part of the contract, the plaintiff is bound by it as by a waiver of the act of 1855. But, if it is binding upon him as a part of the contract, it is binding in accordance with its legal construction, which, as we hold, makes it operate in harmony with, and subject to the general law under which the plaintiff's policy is not "void by reason of any error, mistake, or misrepresentation, unless it shall appear to have been intentionally and fraudulently made." The third section of the act of 1862 did not exempt the defendants, in any case, from the operation of the sixth section of the act of 1855. *Judgment for the plaintiff.*

HIBBARD, J. I concur in the result which is reached in the foregoing opinion, but do not think it can be sustained upon the ground stated. It seems to me that, upon a true construction of the plaintiff's application, the insurance was not on the whole house, but on the undivided half which the plaintiff owned in fee simple, the value of which was found by the jury to be more than sufficient to justify the sum insured upon it. If this view is correct, the question, so ably discussed in the opinion, does not arise. The provisions of the application which tend to favor this construction are not contained in the statement of facts preceding the opinion; and it would not be useful to occupy space in reciting or considering them, nor in assigning reasons for disagreeing with the doctrine of the opinion.

CIRCUIT COURT U. S. — DISTRICT OF CALIFORNIA.

[January 7, 1874.]

ASSESSMENT OF RAILROAD. — CLOUD UPON TITLE BY SALE FOR ILLEGAL TAX. — INJUNCTION TO PREVENT CLOUD BEING CAST UPON TITLE.

HUNTINGTON v. *CENT. PAC. R. R. CO.*

Discussion of the mode of assessing railroads and especially of the manner prescribed by the statutes of California.

The act of the State of California is such that a sale of realty for taxes casts a cloud upon the title, and if the tax for the collection of which the sale is about to be made is unlawful, equity will enjoin the sale.

Where a tax is invalid, and other equitable circumstances are shown to exist, an injunction may issue, in effect restraining the collection of the tax.

SAWYER, C. J., delivered the opinion of the court.

Bill in equity to restrain the sale of the Central Pacific Railroad for the taxes levied in the various counties through which the said railroad extends, for state and county purposes for the year 1872–3.

There are two grounds upon which the application for an injunction is rested. First, on the ground that the Central Pacific Railroad is an instrumentality constructed in pursuance of acts of Congress, and employed by the national government in the exercise of its constitutional powers in providing for the transportation of the mails, the armies of the United States, munitions of war, &c., and, as such instrumentality of the general government, exempt from state taxation. Secondly. That the said taxes have not been assessed in the mode or upon the principles prescribed by the statute, and for that reason the assessment is void.

The first ground has recently been disposed of adversely to the complainants by the supreme court of the United States, in the case of *The Union Pacific Railroad Co.* v. *Peniston, Treasurer, &c.*, decided at the present term, and it requires no further consideration.

As to the second ground; section 3617 of the Political Code of California defines the term "real estate," as used in the statute for the purposes of taxation, as follows: —

"First, the term 'real estate' includes —

"1. The ownership of, claim to, possession of, or the right to the possession of land; . . . .

"3. Improvements.

"Second. The term 'improvements' includes —

"1. All buildings, structures, fixtures, fences, and improvements erected on, upon, or affixed to the land."

The term, "real estate," then, includes both the land and the improvements on the land, and the Central Pacific Railroad is real estate made up of both these classes. First, the ownership, &c., or right to the possession of the land upon which the track is laid, location of engine-houses, stations, water tanks, &c., — in other words, the right of way,

&c.; and, secondly, "Improvements," as engine-houses, station-houses, fences, water tanks, ties, rails, &c., which are either "buildings, structures, fixtures, fences," or, "improvements erected upon or affixed to the land."

So, also, the interest of the company in the railroad is real estate under the general principles of the law, without reference to the statute, as held after a full discussion of a similar question by the supreme court of California, in *N. B. & M. R. R. Company's Appeal*, in the matter of widening Kearney Street, 32 Cal. 505.

Section 3650 of the Political Code, provides that: —

"The assessor must prepare an assessment book with appropriate headings, alphabetically arranged, in which must be listed all property *within the county, and in which must be specified in separate columns under the head* —

"1. The name of the person to whom the property is assessed;

"2. *Land by township, range, section, or fractional section; and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, locality, and the improvements thereon;*

"3. City and town lots, naming the city or town, and the number, block, according to the system of numbering in such city or town, and improvements thereon;

"4. All personal property, showing the number, kind, amount, and quality; but a *failure to* enumerate in detail *such personal* property does not invalidate the assessment;

"5. *The cash value of real estate, other than city or town lots;*

"6. *The cash value of improvements on such real estate;*

"7. The cash value of city and town lots;

"8. The cash value of improvements on city and town lots."

Section 3651 gives the form of the assesment books to be used, ruled into separate columns, one column for each particular specified in the preceding section, with the appropriate headings, among which is one column with the heading "*Value of real estate other than city or town lots*," and immediately following, another headed, "*Value of improvements thereon.*" There is no special provision of the statute for a different mode of assessing railroads. There is no provision at all for assessing railroads, *as railroads*. The only provisions pointing out any exceptional mode of assessing the property owned by railroad companies relates to the rolling stock, which is as follows, to wit: —

"Section 3663. Where the railroad of a railroad corporation lies in several counties, its rolling stock must be apportioned between them, so that a portion thereof may be assessed in each county, and each county's portion must bear to the whole rolling stock the same ratio which the number of miles of the road in such county bears to the whole number of miles of such road lying in this State."

In relation to equalization of assessments by the State Board of Equalization, section 3693 provides: —

"When the property is found to be assessed above or below its full cash value, the board must add to, or deduct from, the valuation of —

"1. *The real estate;*

"2. *Improvements upon such real estate;*

"3. . . . . .

"Such per centum respectively as is sufficient to raise or reduce it to the full cash value."

Under these provisions of the law, railroads must be assessed like any other real estate. They fall clearly within the statutory definition of real estate. The lands and the improvements on them must also be assessed separately, and the land, not being congressional division or subdivision, must be described by "metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, locality, and the improvements thereon." Unless so assessed, the state board cannot equalize the assessment in the mode required by section 3693, which must also equalize each separately by adding to or deducting "from the valuation of, 1. The real estate; 2. Improvements upon such real estate." This may be an unsatisfactory way of assessing railroads, but if so, the wisdom of the legislature has so provided, and the mode must be pursued or the assessment will be void. It cannot be said that this was inadvertently done, for railroads were not overlooked, the mode of assessing the *rolling stock* having been carefully provided for. The bill alleges that the several county assessors, "in making their assessments, did not assess the right of way separately as land consisting of so many acres of such or such a value per acre, nor did they describe it by reference to township, or range, or section, or fractional section, or by metes and bounds, or by other description, except as hereinafter stated, nor did they assess separately the improvements, or iron and ties constituting said superstructure, as improvements of such or such a value, according to the cash value of said ties and iron, nor did they value said lands at their cash value as lands, or as of the same value as other adjoining lands of like quality. On the contrary, they assessed said right of way and superstructure together as constituting one thing, and described them as so many miles of railroad of such or such a value per mile, without regard to the width of the right of way."

And further: —

"That in ascertaining the valuation of said road, said assessors and board of equalization were not governed by the value of the land considered as land, and of the same value as adjoining lands of like quality, nor by the value of ties and iron considered as ties and iron, as new or old, or depreciated in value by use; but on the contrary, they lumped said lands and superstructure and considered them as one thing, and ascertained their value by taking into account the franchises of said company and their value, the cost of construction, fills, embankments, tunnels, cuts, and snowsheds, and the fact that said road extended from San Jose, in the State of California, to Ogden, in the Territory of Utah, — a distance of about eight hundred and seventy-five miles, — and there formed a junction with the Union Pacific, and constitutes a part of a line of railroads extending from the Pacific to the Atlantic Ocean, and the amount of business transacted by said plaintiff on said road, and the profits derived by said plaintiff therefrom; all of which, as complainants aver, was contrary to the rules prescribed by the statute of said State in such case made and provided."

This is certainly neither literally nor substantially the mode of assessing prescribed by the statute; and, as the application is heard on the bill alone, the averments of the bill must be taken as true. Besides, the description is defective. It gives so many miles of railroad without regard to the width of the land occupied, or to any specific location. The bill shows that the land occupied varies in width from 100 to 400 feet, and that it has a superstructure of ties and iron rails forming a track for cars to run on, depots, stations, &c. The description adopted by the assessor is no more definite than that in *Kelsey* v. *Abbott*, 13 Cal. 616, 619, which was held by the supreme court of California to be insufficient, and the assessment consequently void.

But we do not find it necessary to determine whether this defect is fatal. The assessment, as equalized by the state board set out in the bill, shows some curious results. The assessment as equalized in San Joaquin County is twice, and in Placer, more than three times as much per mile as in Santa Clara and Alameda counties, and that of Placer County two and one half times as great as in Nevada County. And the value of the rolling stock as equalized is not apportioned according to the number of miles in each county. But we are not prepared to say that the court could remedy an erroneous or unequal assessment, provided that it is made in the proper mode, upon the proper principle, and in other respects properly made. Doubtless it could not. This assessment, in our judgment, has more radical defects. It is not made in the way prescribed by the statute. It is not only not formally, but is not even substantially such an assessment as the statute requires. The statute, for some wise reason, it must be presumed, expressly requires that the interest in the land and the improvements "*must*" be separately assessed, and separately equalized. This has not been done, and these assessments could not be separately equalized, because the board of equalization would have no data in view of the mode of assessment by which it could be determined what part had been assessed to the land, or what to the improvements.

In states where the statutes contain provisions similar to those in this State, defining real estate for the purposes of taxation, and as to the mode and principle of assessing real estate, as in New York, it has been repeatedly held that the railroads are taxable "*as real estate in the several towns* in which such real estate is to be taxed upon its actual value at the time of the assessment, whether that value is more or less than the original cost thereof;" that "the assessors are simply to ascertain the value of the land, and of the erections or fixtures thereon, irrespective of the consideration whether the road is well or ill-managed, whether it is profitable to the stockholders or otherwise. Such property is to be appraised in the same manner as the adjacent lands of individuals, and without reference to other parts of the railway." *Mohawk & Hudson R. R. Co.* v. *Clute*, 4 Paige, 395; *Alb. & Sch. R. R. Co.* v. *Osborn*, 12 Barb. 225; *A. & W. R. Co.* v. *Town of Canaan*, 16 Barb. 244; see, also, *S. & M. R. Co.* v. *Morgan Co.* 14 Ill. 163; *Tax Cases*, 12 Gill & John. 117. Decisions under different statutes of course have no application.

The statute of New York, under which the decisions cited were made, gives a similar definition of real estate to that cited from the Code of California, and provides, that "All real and personal estate liable to

taxation shall be estimated and assessed by the assessors, at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor." (Stat. N. Y. 1851, 333.) Section 3627 of the Political Code of California is substantially the same. It provides that "All property must be assessed at its full cash value;" and section 3617 provides that "The term 'full cash value,' means the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor." And the assessor must ascertain "all the property *in his county* subject to taxation, and must assess *such property* to the persons who own, claim, have the possession or control thereof."

That is to say, the property in each county must be assessed in that county, without reference to property in any other county, and the value must be estimated at the amount at which that particular land and improvements thereon would be "appraised if taken in payment of a just debt due from a solvent debtor," if taken by itself out of its connections. For it is that portion only that can be taxed and that can be sold, in any given county. In adopting the provisions of New York, the construction before put upon the statutes by the courts of New York must be presumed to have been contemplated.

The bill alleges that the railroad and its appurtenances were not assessed or equalized upon that principle in any of the counties whose collectors are made parties, but that, on the contrary, they "lumped said lands and superstructure, and considered them as one thing, and ascertained their value by taking into account the franchises of said company and their value, the cost of construction, fills, embankments, tunnels, cuts, and snow-sheds, and the fact that said road extended from San Jose, in the State of California, to Ogden, in the Territory of Utah — a distance of about eight hundred and seventy-five miles — and there formed a junction with the Union Pacific, and constitutes a part of a line of railroads extending from the Pacific to the Atlantic Ocean, and the amount of business transacted by said plaintiff on said road, and the profits derived by said plaintiff therefrom; all of which as complainants aver, was contrary to the rules prescribed by the statute of such State in such cases made and provided." If this is so, — and, for the purposes of this motion heard upon the bill alone, the allegation must be taken as true — the assessment was made in direct violation of the provisions of the statute.

Upon the hypothesis alleged, many elements were considered which the statute does not contemplate. In addition to other improper elements considered, such an assessment would be equivalent to taking the valuation of an undivided part of the whole road extending entirely across two states and a part of a territory, and in principle, like the case of *S. & M. R. Co.* v. *Morgan Co.* 14 Ill. 163, it would be taking into consideration value given to it by its connection with other property outside of the said counties, and even outside the state in which the assessments were made; or, in other words, assessing the entire road, including property ouside of the several counties and state where the assessments were made, and then taking a proportionate part of the whole, corresponding to the number of miles of road situate in the particular county where the assessment is made. If the assessment had been made in the mode,

and upon the principle prescribed by the statute, without actual fraud, it would, doubtless, be incompetent for the court to inquire into any error of judgment in ascertaining the value, however gross it might be.

The law has devolved upon the assessors the sole duty of determining the amount, and upon the boards of equalization the duty and power of equalizing, and their determination is final, provided they act in the mode, and upon the principle which the statute requires. But they cannot depart from the mode or the principle prescribed, for when they do this, they act without authority. The court can only inquire as to whether they have pursued the statute. In this case the allegations of the bill being taken as true, as they must be, as now presented, it is apparent that the assessment has not been made or equalized in pursuance of the statute, either in the mode of assessment, namely, by assessing the land and improvements separately, or in the principle adopted for ascertaining the value. Section 3650 of the Political Code expressly provides for listing. "All personal property showing the number, kind, and quality; but a failure to enumerate in *detail* such *personal* property does *not invalidate* the assessment;" and section 3807 provides that "When land is sold for taxes *correctly* imposed, as the property of a particular person, no misnomer of the owner, or supposed owner, or *other mistake relating to the* OWNERSHIP thereof, affects the sale, or renders it void or voidable." Thus it is provided, that a failure to mention in detail *personal* property, or to name the *true owner* of real estate *otherwise* "*correctly*" assessed, shall not vitiate the assessment; but we find no saving clause to protect an assessment substantially defective by a failure to assess in the mode, as to assess the land and improvements separately, and upon the principle prescribed by the statute — such defects as now appear to exist in this assessment. The maxim *expressio unius exclusio alterius est*, would seem to be peculiarly applicable.

It has often been held by the supreme court of California and the courts of other states, that taxes and street assessments not assessed in strict accordance with the provisions of the statute are void. The statute confers the power, and it affords the measure of power. *Smith* v. *Davis*, 30 Cal. 537; *Kelsey* v. *Abbott*, 13 Cal. 618; *Moss* v. *Shear*, 25 Cal. 38; *Blatner* v. *Davis*. 32 Cal. 329; *Taylor* v. *Donner*, 31 Cal. 482; *People* v. *Sneath & Arnold*, 28 Cal. 615; *Falkner* v. *Hunt*, 16 Cal. 167, 172-3; see, also, *Shimmin* v. *Inman*, 26 Me. 228; *Willey* v. *Scoville's Lessees*, 9 Ohio, 43; Blackwell on Tax Titles, 176.

In our judgment, the several assessments in question have not been made in accordance with the provisions of the statute in the particulars indicated, and on those grounds they are void.

But the mere fact alone, that the tax levied is void, affords no ground for *equitable* relief. Are there any other circumstances alleged which present a proper case for equitable cognizance? The bill alleges that the several tax-collectors, who are defendants, threaten to collect and will collect the said several taxes by forced sale of the said railroad, fixtures, and appurtenances, unless voluntarily paid by said Central Pacific Railroad Company; that they will sell the same and give certificates of sale and deeds to the purchasers, under the laws of the State; that said deeds will be conclusive evidence of the validity of said assessments, and the

regularity of the proceedings thereon, and in that event the capital stock of said company owned by defendant will become valueless; or, if the said defendant, the Central Pacific Railroad Company, should pay said taxes to prevent said sale, the complainants will be deprived of a proper portion of dividends, &c. The Political Code provides for sales, for taxes, and that certificates of sales, and deeds containing certain enumerated recitals shall be given to the purchasers; and section 3786 provides, that the deed so given shall be "primary evidence" [that is to say, *primâ facie* evidence, or "that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence." See Civ. Pro. 1833] that: —

"1. The property was *assessed as required by law;*

"2. The property was *equalized as required by law;*

"3. *The taxes were levied in accordance with law;*

"4. The taxes were not paid;

"5. At a proper time and place the property was sold as prescribed by law, and by the proper officer;

"6. The property was not redeemed;

"7. The person who executed the deed was the proper officer;

"8. Where the real estate was sold to pay taxes on personal property, that the real estate belonged to the person liable to pay the tax."

"And *conclusive* evidence of the *regularity of all other proceedings*, from the assessment by the assessor, inclusive, up to the execution of the deed." (Sec. 3787).

That such a deed would cast a *cloud* upon the title, if nothing worse, there can be no doubt. It would only be necessary for the plaintiff to produce his deed to show title. It would then devolve upon the defendant to show affirmatively, by evidence *dehors* the deed, such fatal defects in the assessment as it is admissible to show under the provisions cited, the deed itself being conclusive as to other particulars; and this brings it within the test by which the question is determined whether a deed would be a cloud upon title, established in this State by the decisions of the supreme court. "The true test, as we conceive, by which the question, whether a deed would cast a cloud upon the title of the plaintiff, may be determined, is this: —

"Would the owner of the property in an action of ejectment, brought by the adverse party, founded on the deed, be required to offer evidence to defeat the recovery? If such proof would be necessary, *the cloud would exist;* if no proof would be necessary, no shade would be cast by the presence of the deed." *Pixley* v. *Huggins*, 15 Cal. 133–4; *Thompson* v. *Lynch*, 29 Cal. 189; *Hager* v. *Shindler*, 29 Cal. 47; *Arrington* v. *Liscom*, 34 Cal. 365.

This test is also recognized by implication by the United States supreme court, in *Hannewinkle* v. *Georgetown*, 15 Wall. 548. It is only necessary to introduce the deed under the statute to make out a title. It is not necessary to introduce the record of the prior proceedings, which show the invalidity of the assessment. In such cases the court will interfere by injunction to prevent a cloud being cast upon the title. The court will enjoin the casting of a cloud upon a title in cases wherein the cloud itself, when cast, would be removed. *Palmer* v. *Boling*, 8 Cal. 388; *Fremont* v.

Boling, 11 Cal. 380; *Pixley* v. *Huggins*, 15 Cal. 127; *Hibernia S. & L. Soc.* v. *Ordway*, 38 Cal. 681–2; *Shattuck* v. *Carson*, 2 Cal. 588; *Guy* v. *Hermance*, 5 Cal. 73; *England* v. *Lewis*, 25 Cal. 337; *Alverson* v. *Jones*, 10 Cal. 9–11; *Pettit* v. *Shepherd*, 5 Paige, 501. In *Dows* v. *City of Chicago*, 11 Wal. 112, where a bill was filed by a stockholder of the Union National Bank against the bank and the city, to restrain the collection of a tax levied upon the stock, the complainant alleged only the invalidity of the assessment, without any special circumstances of equitable cognizance. The bill was not sustained expressly on this ground. The bank filed a cross-bill, in which it alleged that a sale of the stock would subject it to a multitude of suits, &c. The court, in deciding the case, say in regard to the cross-bill filed by the bank: "Were it *an original bill, the jurisdiction of the court might be sustained on that ground.* But as a *cross-bill*, it must follow the fate of the *original bill.*" This case is, therefore, authority in favor of the proposition that a bill alleging equitable circumstances of a similar character to those alleged in this bill, in addition to the invalidity of the tax, will be sustained. We think that an act that results in casting a cloud upon the title of real estate is an ordinary ground of equitable relief, and that this bill, in addition to the invalidity of the tax, shows special circumstances sufficient to justify an injunction.

Let an injunction issue, restraining proceedings, in pursuance of the prayer of the bill, until further ordered by the court.

HOFFMAN, J., concurred.

SUPREME COURT OF ILLINOIS.

ISSUING INJUNCTION ON SUNDAY. — ORIGIN OF THE RULE THAT SUNDAY IS DIES NON JURIDICUS.

JAMES LANGABER v. *THE FAIRBURY, PONTIAC, AND N. W. R. R. CO. ET AL.*

In a case of necessity a court may issue a writ of injunction on Sunday.

OPINION by BREESE, J. This was a bill in chancery in the Livingston circuit court, praying for a writ of injunction to restrain the Fairbury, Pontiac, and Northwestern Railway Company from taking possession of one of the principal streets (Walnut) in the incorporated town of Fairbury, for the purpose of grading, tieing and ironing the same for the track of their railroad. The bill is filed by a large property owner on the street to be taken by the railway, and it alleges that the company, immediately after twelve o'clock of the night of Saturday, with a large force of men had taken violent possession of the street, for the express and avowed purpose of finishing their track through its entire length before the next Monday morning, and that they had selected Sunday for the work for the express purpose of evading an injunction and avoiding the process of court, and for the purpose of obtaining and holding the street without paying for it, or the damages thereby occasioned to the property owners upon it.

That the company has not paid or offered to pay anything to any person injured by the proposed occupancy of that street, nor taken any steps or measures to estimate the damages, or have the same assessed in pursuance of law. It is also alleged the company is wholly insolvent, and if it is permitted to take possession, control, and use that street for the purpose of operating their trains over the same, without paying complainant the damages he will sustain in consequence thereof, he will be without remedy in the premises, and will absolutely lose at least one half the value of his property in consequence thereof, and that the grading for railway purposes will greatly injure the street and complainant's property, and unless the company, the contractors, and their agents and servants are restrained by injunction issued forthwith, the road will be finished through the street to-day, Sunday, and that the company and its contractors are doing the work on this day, Sunday, in order to avoid paying complainant his damages, and to defraud him out of the same, which they will accomplish successfully unless immediately enjoined by process of the court.

This bill was presented to the master in chancery in the absence of the circuit judge on Sunday; the writ of injunction was ordered by the master on that day, and issued by the clerk, and served by the sheriff on the same day. At the September term following a motion was made to quash the writ, which was allowed and the bill dismissed.

Complainant brings the record here by writ of error, and assigns this action of the court as error.

The bill on its face presents strong grounds for the interference of a court of chancery, and justified the ordering and issuing a writ of injunction. But the defendant insists if this be so, no valid writ could issue on Sunday. He insists that the order of the master in chancery being made on Sunday was void, for the reason it was a judicial act, and Sunday is not a judicial day. As a general proposition it may be conceded Sunday is not a day in law for proceedings, contracts, &c. 2 Inst. 264.

Anciently, however, courts of justice did sit on Sunday. The early Christians of the sixth century and before used all days alike for hearing of causes, not sparing the Sunday itself; but in the year 517 a canon was promulgated exempting Sundays. Other canons were adopted in subsequent years, exempting other days, which were all revised and adopted by the Saxon kings, and all confirmed by William the Conqueror and Henry the Second, and in that way became a part of the common law of England. *Swann* v. *Broome*, 3 Burrow, 1595. By the canons of the church, Sunday was decreed *dies non juridicus*, and by the same canons other days were declared unjuridical, as the day of the Purification of the Blessed Virgin Mary, the feast of the Ascension, the feast of St. John the Baptist, and All Saints and All Souls days. These were as much unjuridical days as Sunday, yet the most devoted admirer of the common law would not hesitate to say that the proceedings of a court of justice in this State on either of those days would be valid. Yet by the common law no valid judicial act could be performed on either of those days. Why, then, if such an act can be done and have binding force on these unjudicial days in this State, why should not equal efficacy be accorded to the same act if done on the other unjudicial day, viz. Sunday? It is answered that secular employment of any kind is prohibited by our Criminal Code, and reference is made to section 144.

We had occasion, in *Johnson* v. *The People*, 31 Ill. 469, to express briefly our views of this question, the case being one where a recognizance had been taken by a magistrate on Sunday, from which the cognizor sought to be discharged, on the ground that having been taken on Sunday, and being a judicial act, it was void and of no effect. This court said, generally judicial acts cannot be performed on Sunday, but the recognizance was held to be valid and no violation of the section referred to. That we were to understand by the word "necessity" not a physical and absolute necessity, but the moral fitness or propriety of the work done under the circumstances of each particular case; that any work, therefore, necessary to be done to secure the public safety by the safekeeping of a felon, or delivering him to bail, must come within the true meaning of the exception in the statute; that neither the peace or good order of society was disturbed by such a proceeding, as it may be, and usually is, silently conducted. The notion that Sunday is a day so sacred that no judicial act can be performed, had its origin with ecclesiastics of an unenlightened age, and rests upon no substantial basis; and if it is the doctrine of the common law, it need not have application here, in this day of thought and increased enlightenment. Men are freer now than then, and are permitted to regard acts as innocent and harmless which were then deemed sacrilegious and worthy of anathema. So long as our own statute is not violated, so long as nothing is done which it forbids, there can be no reasonable ground for complaint. There is nothing in our constitution of government inhibiting the general assembly from declaring Sunday to be *dies non juridicus*. One step has been taken in that direction, by providing, by law, as follows: On proof being made before any judge or justice of the peace, or clerk of the circuit court within this State, that a debtor is actually absconding or concealed, or stands in defiance of an officer duly authorized to arrest him on civil process, or has departed this State with the intention of having his effects and *personal* estate removed out of the State, or intends to depart with such intention, it shall be lawful for the clerk to issue, and the sheriff or other officer to serve an attachment against such debtor on Sunday, or any other day, as is directed in this chapter. R. S. 1845, ch. 9, sec. 27. Here this *dies non juridicus* was selected by the railroad company as the proper day to commit a great outrage upon private and public rights, believing the arm of the law could not be extended on that day to arrest them in their high-handed and unlawful design. To the complainant, the acts they were organized to perpetrate on that day were fraught with irreparable injury. Feeble indeed would be the judicial arm if it could not reach such miscreants. To save a debt of twenty dollars, judicial acts can be performed on Sunday, and ministerial as well. To prevent the ruin of an individual such an act must not be done! Lame and impotent conclusion. In Comyn's Digest, title "*Temp*," under the head *Dies non juridicus*, it is said the chancery is always open. So the exchequer may sit upon a Sunday or out of term. 5th ed. p. 405. There is nothing, to an intelligent mind, revolting in this. Suppose, in times of high political excitement, a citizen is indicted for treason, and judgment of death pronounced against him by a servile judge, who, not a slave of the crown, as were Trevelyan, Scroggs, and Jeffries, but yet the slave of an enraged populace, on an indictment never

returned into court or found by a grand jury, and defective in every essential, and this judgment pronounced on Saturday, and the time of his execution fixed on the following Monday. To arrest this proposed judicial murder, an application is made to a member of the appellate court on the intervening Sabbath; who would justify the judge should he fold his arms, and on the plea the day was not a judicial day, suffer the victim to be led to execution? The necessity of the case would be the law of the case. The judge who has no respect for this principle is unworthy the ermine, and an unfit conservator of the rights of the citizen. The case before us is not one of life or death, but involves irreparable injury to property. An imperious necessity demanded the prompt interposition of chancery. On that principle the act is fully justified. This is the dictate of right, of reason, of common justice and common sense.

The decree of the court below, quashing the writ of injunction and dismissing the bill, is reversed, and the cause remanded for further proceedings.

A. E. Harding, for appellant.

R. G. Ingersoll, L. E. Payson & N. J. Pillsbury, for appellees.

SUPREME COURT OF IOWA.

[September Term, 1873.]

PENALTY. — LIQUIDATED DAMAGES. — STIPULATION FOR RECOVERY OF FURTHER SUM IF NOTE SUED UPON.

J. S. McINTYRE, Appellant, v. *GEORGE CAGLEY.*

The defendant made a promissory note payable to the plaintiff to which this clause was added, "And we agree also to pay an attorney's fee of ten per cent. if this note is collected by suit." The note having been put in suit, held that the stipulated ten per cent. could be recovered, and that it was not in the nature of a penalty, but of liquidated damages.

This action was brought upon a promissory note, as follows: —

"$472.65. Clarinda, Iowa, *November* 12, 1872.

"Ninety days after date, for value received, we jointly and severally promise to pay to J. S. McIntyre, or order, the sum of four hundred and seventy-two 65–100 dollars, with interest from maturity at the rate of ten per cent. per annum, interest payable annually; payable at the First National Bank, Clarinda; and we agree also to pay an attorney's fee of ten per cent. if this note is collected by suit.

(Signed) "George Cagley."

The defendant made default, and the plaintiff gave the note in evidence, and moved the court for judgment thereon for the amount thereof with interest and costs, and ten per cent. for attorney's fees, as stipulated in the note and demanded in the petition. The court refused to render

judgment for the stipulated attorney's fee unless plaintiff would prove that such fee was reasonable. This plaintiff declined to do, and the court refused to assess the attorney's fee as a part of the amount due on the note. Plaintiff appeals.

W. W. Morsman, for appellant.

No appearance for appellee.

Miller, J. The court below held that the stipulation in the note sued on, by which the maker agrees to pay "an attorney's fee of ten per cent." on the amount of the note, was in the nature of a penalty to cover the expense of collecting the note by action, and therefore reasonable only to the extent of such actual expense, which must be shown by evidence.

We have decided in a number of cases that it is competent for parties to written instruments for the payment of money, to stipulate for the payment of a reasonable sum as an attorney's fee, where suit is brought to enforce payment of the money due on the instrument, and that such agreements will be enforced. See *McGill* v. *Griffin et ux.* 32 Iowa, 445, where the cases are collected and reviewed. In none of those cases, however, did the question here made arise. In those cases the agreement was to pay a "*reasonable*" sum; here it is to pay a fixed amount, viz. ten *per centum* on the amount of the note.

One of the rules of construction in cases of this nature is, that the action of the court will not be defined and determined by the *terms* which the parties have seen fit to apply to the sum agreed upon. Although they have called it a *penalty*, or given it no name at all, it will be treated as liquidated damages, if, from the nature of the agreement and the surrounding circumstances, and in reason and justice it ought so to be. *Sainter* v. *Ferguson*, 7 Com. Bench, 716; *Chamberlain* v. *Bagley*, 11 N. H. 234; *Brewster* v. *Edgerly*, 13 Ib. 275; *Mundy* v. *Culver*, 18 Barb, 336; *Foley* v. *McKeegan*, 4 Iowa, 1, and cases cited on page 6. And on the other hand, although they call the sum liquidated damages, it will be treated as a penalty, if, from a consideration of the whole contract, it appears that the parties intended it as such, or if, where the injury is certain, the sum fixed upon is clearly disproportionate to the injury, and the real claim which grows out of it. *Foley* v. *McKeegan*, *supra*, and cases cited.

Among the principles upon which this question should be determined are these: that the sum agreed upon will be treated as a penalty, unless, *first*, it be payable for an uncertain amount; and, *second*, unless it be payable for one breach of contract, or, if for many, unless the damages to arise from each of them are of uncertain amount. *Foley* v. *McKeegan*, *supra*; 3 Parsons on Con. 159, and cases cited in notes.

In *Taylor* v. *Sandiford*, 7 Wheat. 13, Marshall, C. J., says: "In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of the contract by the opposite party."

Guided by these principles, we are of opinion that the stipulation in the note to pay the attorney's fee, cannot be properly regarded as a penalty. It is not to be paid for the non-performance of an agreement. It does not become payable, nor does it create any liability whatever, upon the

maturity of the note, unless suit is brought to enforce collection thereof. It is an agreement to reimburse the plaintiff for his expenses incurred in collecting the note by suit. *Williams* v. *Meeker*, 29 Iowa, 292. Again, it is payable for an injury of uncertain amount and extent. It is not like a case of a promise to pay two thousand dollars, if the promisor fail to pay one thousand dollars in three months; in which case it is obvious that the larger sum is a penalty for the non-payment of the smaller one, even though the parties call it liquidated damages. The injury in such case is a certain one, and the measure of damages is also certain — being legal interest on the sum due. *Bagley* v. *Peddie*, 5 Sandf. 192; *Williams* v. *Dakin*, 22 Wend. 211; *Hoag* v. *McGinnis*, Ib. 163; *Heard* v. *Bowers*, 23 Pick. 455; *Mead* v. *Wheeler*, 13 N. H. 351. But in the case before us the measure of damages is uncertain. What would be a reasonable amount to reimburse the plaintiff for the fees of an attorney in prosecuting a suit upon the note, and collecting the amount due thereon, is not certain, and, in the absence of an agreement of the parties, would have to be ascertained by the court or a jury upon evidence. In cases like this, the parties may agree beforehand what the injury shall be valued at, or what shall be taken as a compensation; for if the court should set it aside, it can only do what the parties had a right to, and have done, and that is, arrive at a general probability by a consideration of all the circumstances of the case. The court would have to hear testimony and determine therefrom the measure of the injury. It being impossible to define with certainty beforehand, by reference to a money standard, the measure of the injury, it was competent for the parties to agree thereon, which they have done. The collection of a note of the amount of the one sued on in this case might, under some circumstances, involve labor and expense much greater than under others. There being this uncertainty, the sum agreed upon by the parties will not be treated as a penalty, unless for such obvious excess and disproportion to rational expectation of injury, as to make it clear that the principle of compensation was wholly disregarded, which does not appear in this case. 3 Parsons on Contracts, pages 159, 160, 161, and notes.

Of course if this sort of an agreement be resorted to as a cloak for usury, and it is so made to appear in an action thereon, it will be treated as any other usurious contract. The party would not be permitted to recover a sum of money under the denomination of attorney's fees, which was in fact unlawful interest.

The judgment of the court below will be *Reversed.*

Cole, J., dissenting. I dissent because the opinion seems to me to be contrary to the well settled rules respecting penalties and liquidated damages; and because its tendency will be to subject debtors to hard and excessive exactions under the name of attorney's fees.

It will be observed that the opinion is grounded upon the construction of the contract, and holds that the sum stipulated to be paid is liquidated damages. If this is correct, then the same construction must follow if the sum stipulated was two, three, five, or ten times as great. And it requires no prophet to foretell that, under such a construction, the exactions for attorney's fees, in name, will soon become exorbitant and oppressive.

In my opinion, the sum fixed should be construed as a penalty, and the

plaintiff allowed to recover thereunder such sum as he can show to be a reasonable attorney's fee in the particular case. And this, because, *First.* The rule is universal to construe such fixed sum as a penalty, unless the intent to make it liquidated damages is manifested beyond a reasonable doubt — in this case such intent is not manifested, and the term "liquidated damages" is not even used. *Second.* The sum fixed is to be paid by reason of a default in the payment of a sum of money at a specified time; and in such cases courts never construe the sum fixed as liquidated damages, but always as a penalty. *Kuhn* v. *Myers et al.* (present term). *Third.* The plaintiff may not lawfully have more than ten per cent. for the use of his money, and if the stipulated sum is in excess of a reasonable attorney's fee, which is all plaintiff can have to pay, he does obtain more than that rate, and under the foregoing opinion could successfully violate the law in this respect, for it would be, as held therein, liquidated damages, and not interest or usury. And, *finally*, Because if the stipulated sum is construed as a penalty, perfect and complete justice will thereby be meted out to both parties: for that the defendant would have to indemnify the plaintiff for the default, by paying him the reasonable attorney's fee expended in the case: and the plaintiff would be prevented from taking the money of the defendant without an equivalent. This, very briefly, is the *law* and the *right*, as I am able to see them; but I cannot comprehend, as such in truth, either the reason, the law, or the justice of the foregoing opinion and its results. The judgment of the court below ought, therefore, to be affirmed, and not *Reversed.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

[TO APPEAR IN 109 MASS.]

BILL IN EQUITY. — PAROL EVIDENCE. — ABSOLUTE CONVEYANCE HELD TO BE A MORTGAGE.

CAMPBELL v. *DEARBORN.*

A bill in equity, to declare the plaintiff entitled to redeem land, which the defendant holds by an absolute conveyance from him, may be maintained upon parol proof that he bought the land with money borrowed from the defendant, and, though he executed his absolute deed intelligently, yet both parties understood that it was intended as security for the loan.

BILL IN EQUITY, filed July 12, 1869, to compel a reconveyance of land by the defendant to the plaintiff, on the ground that the plaintiff's conveyance of it to the defendant, although in form absolute, was in substance a mortgage.

The bill alleged that the plaintiff on June 11, 1866, agreed with Artemas Tirrill for the purchase by him from said Tirrill of a parcel of land in Charlestown, and at the same time Tirrill gave him a bond to convey the land at any time within three years from said June 11, upon the payment to him of $5,500, the plaintiff to pay all assessments upon the

land meanwhile; that since taking the bond the plaintiff has occupied the land; that in the early part of June, 1869, he made arrangements to borrow the sum of $5,500 from Charles J. Walker, in order to tender the same to Tirrill, and secure performance of his obligation to convey, within the time fixed in the bond; that on June 11, 1869, being disappointed in finding Walker, he met the defendant; that the defendant expressed regret that the plaintiff should be obliged to lose fulfilment of the bond through not having in time the money required, and voluntarily offered to lend to the plaintiff the required amount, and the plaintiff accepted the offer as an act of friendship, as he supposed; that the defendant and the plaintiff went immediately to Tirrill and tendered to him said sum of $5,500, and Tirrill thereupon delivered to the plaintiff his deed of the land in fee simple, in compliance with the bond, which deed was dated May 21, and was acknowledged before the defendant as a justice of the peace on said June 11, 1869; that upon leaving Tirrill the defendant said to the plaintiff that he ought to be secured for his loan in some way, and proposed that they should go to the defendant's attorney, to have the necessary papers prepared; that they thereupon went to the attorney's office, where the defendant and the attorney consulted together privately, and, without consulting the plaintiff, an instrument was drawn, and handed him to sign, which upon reading he found to be drawn to convey the land in fee simple to the defendant; that the plaintiff objected to this form of conveyance, and desired to have a mortgage drawn instead, but was assured by both the attorney and the defendant that the instrument prepared would have the same effect; that, being ignorant of the legal effect of said instrument made under such circumstances, and relying on the statements of the attorney and the defendant, he on said June 11, executed and delivered said deed to the defendant; and that it was recorded in the registry of deeds at the same time with Tirrill's deed.

The bill also alleged that the plaintiff believed, and from the manner and declarations of the defendant at the time, had every reason to believe, that the loan was prompted by the kindness of a friend, and was a gratuitous loan, and one which he was to immediately repay, and he accepted it accordingly; that on the same day he asked the defendant how soon the money must be repaid, and the defendant replied, "In a few days;" that the plaintiff at the same time said to the defendant that he had arranged for a permanent loan on the land and thought the matter could be settled on the next day, June 12; that on said June 12 Charles J. Walker, who had agreed to lend the plaintiff $5,000 upon a mortgage on the land, was not ready to do so, as his attorney desired more time to examine the title, and the plaintiff went to the defendant and stated the occasion of delay, and asked him to be ready to receive the money advanced and execute a deed conveying the land back to the plaintiff the next Monday; that the defendant replied that he was going to Philadelphia on that day, but would settle the matter upon his return, which would be about June 17; and that at this interview, the plaintiff, feeling very grateful to the defendant for what he had done, suggested that he was disposed to pay him for his trouble in the premises, but the defendant replied, "Never mind now, we will make that all right," from which the plaintiff inferred that the defendant would make no charge for the loan.

The bill further alleged that on the 17th, 18th, and 19th of June the plaintiff endeavored to find the defendant and repay his loan and obtain his deed, but was unable to find him; that on the 21st of June the plaintiff saw the said attorney of the defendant, who had told him that the attorney was authorized to settle the matter, and said attorney informed the plaintiff that the defendant would not reconvey the land unless he was paid the sum advanced and $500 besides for the use of the money, whereat the plaintiff was greatly astonished and so stated to the attorney; that the plaintiff afterwards saw the defendant, and objected to the charge, and gave him to understand that he supposed the loan to be gratuitous, but rather than have any ill feeling he would pay $250; that the defendant refused to accept that sum; and that the plaintiff has been desirous of obtaining a reconveyance of the land, and has tendered the defendant the said sum of $5,500 with legal interest from the time of the loan, and has also tendered a deed reconveying the land to the plaintiff, to be executed by the defendant; but that the defendant refused to accept the tender and to execute the deed.

The prayer was "that the plaintiff may have proper relief in the premises; that an account may be taken of what, if anything, is due to the defendant for principal and interest on said loan; that the plaintiff may be permitted to redeem the land, he being ready and willing, and hereby offering, to pay what, if anything, shall appear to be due in respect to said loan and interest accrued; and that the defendant may be decreed to convey the land to the plaintiff in fee, free from all incumbrances made by him or any person claiming under him, and may be restrained from making any sale or conveyance thereof to any person or persons pending this bill."

The defendant, in his answer, denied that he ever made or offered to make any loan to the plaintiff; alleged that, on the contrary, he refused a request of the plaintiff for a loan; and further alleged that "the defendant agreed to pay Tirrill the said sum of $5,500 for the premises described in the bill, provided the title to said premises should stand in the defendant's name," and the plaintiff agreed that immediately on payment of the sum to Tirrill the land should be conveyed in fee simple to the defendant, "and the plaintiff should not have any interest or title thereto;" that thereupon the defendant paid the $5,500 to Tirrill, and Tirrill executed and delivered to the plaintiff a deed of the land; that the plaintiff did not have any title or interest in the purchase money or any part thereof, but the whole of it was property of the defendant; that the land was not purchased of Tirrill for the benefit of the plaintiff, "neither did the defendant agree to purchase it for the benefit of the plaintiff, but for the use and benefit of the defendant;" that by said purchase the equitable title to the land was vested in the defendant; and that the plaintiff, in pursuance of his said agreement, did convey the land to the defendant in fee simple, "for the purpose of vesting both the legal and equitable title in the defendant;" that the agreement between the plaintiff and the defendant, that the plaintiff should make such an absolute conveyance, and no other, was fair and distinct; that "before and at the time of said payment to said Tirrill" the defendant refused "to lend the plaintiff said money, and to allow the plaintiff to have any interest in said money or

the premises purchased therewith;" and that the plaintiff's deed was read in his presence and hearing before he executed it, and he was then and there informed that it was an absolute conveyance and that he thereby ceased to have any interest whatever in the land.

The answer also alleged that afterwards, and as an independent transaction, the defendant at the plaintiff's request orally agreed to reconvey the land to him for the consideration of $6,000 to be paid on June 18, 1869, together with such charges as the defendant should make for his expenses incident to the several conveyances; that although the defendant then well knew, and still insists, that this agreement had no legal force or effect, for the reason that it was not in writing, yet on the day named he was ready and willing to perform his part of it, but the plaintiff neglected and refused to perform his own part or pay any sum whatever, and thereupon the defendant considered himself released from all obligations to the plaintiff; that on June 19, 1869, he made another oral agreement with the plaintiff to reconvey the land to him for the sum of $6,000, together with such expenses as the defendant had incurred by reason of said conveyances, provided the agreement should be carried into effect forthwith, and the plaintiff then and there agreed to pay said sum; that the defendant on the same day executed a quitclaim deed, with the usual covenants, conveying the land to the plaintiff in pursuance of this agreement, and has repeatedly tendered this deed to the plaintiff; but that the plaintiff refused to comply with the agreement, and to pay the expenses incurred by the defendant in the premises; and that the defendant "now and always has denied that the plaintiff had any right to or interest in said premises, except such as he may have acquired under said parol agreements made subsequently to and independently of the conveyance" from the plaintiff to the defendant.

The answer then denied "that the defendant, or any one in his behalf, or at his request, or with his knowledge, ever made any representations or intimation to the plaintiff that the conveyance of the plaintiff to the defendant was or had the effect of anything but an absolute conveyance in fee simple:" alleged "that the plaintiff well knew the contents and the legal effect thereof, and the same was fully explained to and understood by the plaintiff before the execution thereof, and no assurances or intimations were made, at or before the execution or delivery thereof, that the land would be reconveyed;" denied "that the plaintiff has ever tendered to the defendant the amount paid by him and interest thereon, or any other sum as alleged;" set up the statute of frauds "in answer to the several averments of contracts, agreements, promises, and trusts concerning the premises with, to, or for the benefit of the plaintiff in the bill contained, and to so much of the bill as sets forth any pretended contract, agreement, trust, or confidence between the plaintiff and the defendant, or as seeks any relief or discovery, of the defendant, of or concerning any pretended contract, agreement, trust, or confidence between the plaintiff and the defendant, touching the land or premises mentioned in the bill, or any part thereof;" denied "that the defendant, or any person thereunto by him lawfully authorized, did ever make or sign any writing whatsoever, of or containing any such contract, promise, agreement, grant, or declaration with, to, or for the benefit of the plaintiff touching the said land, or creat-

ing any estate or interest therein, or creating or declaring any trust respecting the same, in or for the benefit of the plaintiff;" and finally denied all the plaintiff's allegations which were not above expressly admitted.

The plaintiff filed a general replication, and the case was heard by Colt, J., who made the following report thereof: —

"The plaintiff was the only witness in support of his case, and testified substantially to the facts stated in the bill. The defendant testified in substance to the facts stated in his answer, and was confirmed in the main part of his evidence by the testimony of the attorney who prepared the deed from the plaintiff to him, but who also testified more fully to what was said between the parties at his office at the time the deed was executed. The witnesses appeared to me to be equally entitled to credit.

"I find as a fact, that the deed to the defendant was executed by the plaintiff intelligently, and not by accident or mistake; and that no fraud was practised to procure its execution, other than may be inferred, if any, from the facts testified to and here found by me. I find, from all the circumstances surrounding the transaction, and from the acts and declarations of the parties at the time, that the plaintiff believed, and had reason to believe, that the payment made to Tirrill was made to prevent a forfeiture of the plaintiff's rights under the contract, as a friendly act on the part of the defendant, with a view to give him further time to raise the money due thereon, and that the defendant would within a few days, on being repaid the purchase money and a compensation for his trouble, reconvey the same to him. It appeared that no definite time was named for the repayment, and no definite amount was fixed as compensation; and that the defendant refused to take a mortgage instead of an absolute deed, insisting upon the ownership of the property, and the right to charge what he had a mind to for his services, in case he should reconvey.

"I report the case for the consideration of the full court, such order or decree to be entered as law and justice may require."

The pleadings were made a part of the report, and the case was argued in writing for the plaintiff, and orally for the defendant, in January, 1871, and was decided in September, 1873.

G. A. Somerby, *G. B. Bigelow & S. C. Darling*, for the plaintiff.

W. S. Gardner, for the defendant.

WELLS, J. Regarding the money paid to Tirrill for the land as the money of the plaintiff, by loan from the defendant, there is still no resulting trust in favor of the plaintiff arising from the whole transaction. A deed was taken to the plaintiff, according to his equitable interest; and he thereupon conveyed to the defendant by his own deed. The recitals and covenants of that deed preclude him from setting up any trusts by implication, against its express terms. *Blodgett* v. *Hildreth*, 103 Mass. 484. His agreement with the defendant for a reconveyance cannot be enforced as a contract for an interest in lands; Gen. Sts. *c.* 105, § 1; nor will it create an express trust; Gen. Sts. *c.* 100, § 19. The question then is, Can the deed be converted into a mortgage, or impeached and set aside, or its operation restricted, upon any ground properly cognizable in a court of chancery?

This question was somewhat discussed, though not decided, in *Newton* v. *Fay*, 10 Allen, 505. Some suggestions were made as to the bearing

of the statute of frauds upon it, in *Glass* v. *Hulbert*, 102 Mass. 24. For the reasons there suggested, we do not regard the statute of frauds as interposing any insuperable obstacle to the granting of relief in such a case; because relief, if granted, is attained by setting aside the deed; and parol evidence is availed of to establish the equitable grounds for impeaching that instrument, and not for the purpose of setting up some other or different contract to be substituted in its place. If proper grounds exist and are shown for defeating the deed, the equities between the parties will be adjusted according to the nature of the transaction and the facts and circumstances of the case; among which may be included the real agreement. It does not violate the statute of frauds, to admit parol evidence of the real agreement, as an element in the proof of fraud or other vice in the transaction, which is relied on to defeat the written instrument.

What will justify a court of chancery in setting aside a former deed, and giving the grantor an opportunity to redeem the land, on the ground that it was conveyed only for security, although no defeasance was taken, is a question of great difficulty, and one upon which there exists a considerable diversity of adjudication, as well as of opinion. In Story Eq. § 1018, it is stated in general terms to be "fraud, accident, and mistake." In 4 Kent Com. (6th ed.) 142, 143, it is laid down that "parol evidence is admissible in equity, to show that an absolute deed was intended as a mortgage, and that the defeasance was omitted or destroyed by fraud, surprise, or mistake."

"It is determined, on the statute of frauds, that, if a mortgage is intended by an absolute conveyance in one deed and a defeasance making it redeemable in another, the first is executed, and the party goes away with the defeasance, that is not within the statute of frauds." *Dixon* v. *Parker*, 2 Ves. Sen. 219, 225. Similar declarations are to be found in *Walker* v. *Walker*, 2 Atk. 98, *Joynes* v. *Statham*, 3 Atk. 388, and *Maxwell* v. *Mountacute*, Pre. Ch. 526; and adjudications in *Washburn* v. *Merrills*, 1 Day, 139, *Daniels* v. *Alvord*, 2 Root, 196, and *Brainerd* v. *Brainerd*, 15 Conn. 575; and see Story Eq. § 768.

This indeed is only one form of application of the general rule of equity, that one, who has induced another to act upon the supposition that a writing had been or would be given, shall not take advantage of that act, and escape responsibility himself, by pleading the statute of frauds on account of the absence of such writing, which has been caused by his own fault. Besides the cases cited in *Glass* v. *Hulbert*, 102 Mass. 24, see *Bartlett* v. *Pickersgill*, 1 Eden, 515; *S. C.* 1 Cox Ch. 15; Browne on St. of Frauds, § 94. But this principle will not help the plaintiff here, because he does not allege that any defeasance was intended or expected; and it is found by the report that the deed "was executed by the plaintiff intelligently, and not by accident or mistake, and that no fraud was practised to procure its execution, other than may be inferred" from the facts stated.

From those facts, and from the bill and answer, we think these points must be taken to be established, to wit, 1st. that the plaintiff had purchased the parcel of land in controversy and held a contract from Tirrill for its conveyance to himself upon payment of the sum of $5,500; 2d.

that the money was paid to Tirrill, and the land conveyed by Tirrill to the plaintiff, in fulfilment of that contract; 3d. that the money was advanced by the defendant to the plaintiff as a loan, and the deed from the plaintiff to the defendant was given by way of security therefor. The report finds, "from all the circumstances surrounding the transaction, and from the acts and declarations of the parties at the time, that the plaintiff believed and had reason to believe" this to be the case.

The defendant, in his answer, does not pretend that he ever made any contract, either with Tirrill or the plaintiff, by which a price was agreed upon to be paid by him as and for the purchase of the premises for himself. His only allegation to this point is, at most, indirect and equivocal. He denies that said estate was purchased of Tirrill for the plaintiff's benefit, "neither did this defendant agree to purchase it for the benefit of the plaintiff, but for the use and benefit of the defendant." This is followed by an argumentative assertion of equitable title acquired as a resulting trust from payment of the purchase money, and that the deed from the plaintiff was given "for the purpose of vesting both the legal and equitable title in the defendant." He does allege that he "agreed to pay Tirrill the said sum of $5,500 for the premises described in the bill, provided the title to said premises should stand in the defendant's name." He alleges, with sufficient fulness and minuteness, that he refused to make a loan of the money to the plaintiff both "before and at the time of said payment to said Tirrill," and refused "to allow the plaintiff to have any interest in said money, or the premises purchased therewith," and that it was agreed that the premises should be conveyed in fee simple to the defendant, "and the plaintiff should not have any interest or title thereto." He further avers "that, before the plaintiff signed and executed his deed to this defendant, said deed was read in the presence and hearing of the plaintiff, and he was then and there informed that the same was an absolute conveyance, and that he ceased thereby to have any interest whatever therein." Taking the facts to be literally as thus alleged, they significantly suggest the inference that the money was advanced by the defendant for the accommodation of the plaintiff in his purchase of the land, and the deed given to the defendant for his security therefor; but that it was agreed between them that the plaintiff should retain no legal right of redemption. He was to trust himself wholly to the good faith and forbearance of the defendant.

It is alleged in the bill, and not denied in the answer, that the land has been all the time in the occupation of the plaintiff. We think it is also to be inferred that the land is of considerably greater value than the sum advanced by the defendant.

From the whole case we are satisfied that it was a transaction between borrower and lender, and not a real purchase of the land by the defendant. We are brought, then, to the question, Can equity relieve in such a case?

The decisions in the courts of the United States, and the opinions declared by its judges, are uniform in favor of the existence of the power, and the propriety of its exercise by a court of chancery. *Hughes* v. *Edwards*, 9 Wheat. 489; *Sprigg* v. *Bank of Mount Pleasant*, 14 Pet. 201, 208; *Morris* v. *Nixon*, 1 How. 118; *Russell* v. *Southard*, 12 How. 139:

Taylor v. *Luther*, 2 Sumner, 228; *Flagg* v. *Mann*, Ib. 486; *Jenkins* v. *Eldredge*, 3 Story, 181; *Bentley* v. *Phelps*, 2 Woodb. & Min. 426; *Wyman* v. *Babcock*, 2 Curtis C. C. 386, 398; *S. C.* 19 How. 289. Although not bound by the authority of the courts of the United States, in a matter of this sort, still we deem it to be important that uniformity of interpretation and administration of both law and equity should prevail in the state and federal courts. We are disposed therefore to yield much deference to the decisions above referred to, and to follow them, unless we can see that they are not supported by sound principles of jurisprudence, or that they conflict with rules of law already settled by the decisions of our own courts.

We cannot concur in the doctrine advanced in some of the cases, that the subsequent attempt to retain the property, and refusal to permit it to be redeemed, constitute a fraud and breach of trust, which affords ground of jurisdiction and judicial interference. There can be no fraud or legal wrong in the breach of a trust from which the statute withholds the right of judicial recognition. Such conduct may sometimes appear to relate back, and give character to the original transaction, by showing, in that, an express intent to deceive and defraud. But ordinarily it will not be connected with the original transaction otherwise than constructively, or as involved in it as its legitimate consequence and natural fruit. In this aspect only can we regard it in the present case.

The decisions in the federal courts go to the full extent of affording relief, even in the absence of proof of express deceit or fraudulent purpose at the time of taking the deed, and although the instrument of defeasance "be omitted by design upon mutual confidence between the parties." In *Russell* v. *Southard*, 12 How. 139, 148, it is declared to be the doctrine of the court, "that, when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as payment of purchase money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage." The conclusion of the court was, "that the transaction was in substance a loan of money upon security of the farm, and, being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage."

This doctrine is analogous, if not identical with that which has so frequently been acted upon as to have become a general if not universal rule, in regard to conveyances of land where provision for reconveyance is made in the same or some contemporaneous instrument. In such cases, however carefully and explicitly the writings are made to set forth a sale with an agreement for repurchase, and to cut off and renounce all right of redemption or reconveyance otherwise, most courts have allowed parol evidence of the real nature of the transaction to be given, and, upon proof that the transaction was really and essentially upon the footing of a loan of money, or an advance for the accommodation of the grantor, have construed the instruments as constituting a mortgage; holding that any clause or stipulation therein, which purports to deprive the borrower of his equitable rights of redemption, is oppression, against the policy of the law, and to be set aside by the courts as void. 4 Kent Com. (6th ed.) 159; Cruise

Dig. (Greenl. ed.) tit. xv. c. 1, § 21; 2 Washb. Real Prop. (3d ed.) 42; Williams on Real Prop. 353; Story Eq. § 1019; Adams Eq. 112; 3 Lead. Cas. in Eq. (3d Am. ed.), White & Tudor's notes to *Thornbrough* v. *Baker*, pp. 605 [*874] *& seq.*; Hare & Wallace's notes to *S. C.* pp. 624 [*894] *& seq.*

The rule has been frequently recognized in Massachusetts, where, until 1855, the courts have held their jurisdiction of foreclosure and redemption of mortgages to be limited to cases of a defeasance contained in the deed or some other instrument under seal. *Erskine* v. *Townsend*, 2 Mass. 493; *Killeran* v. *Brown*, 4 Mass. 443; *Taylor* v. *Weld*, 5 Mass. 109; *Carey* v. *Rawson*, 8 Mass. 159; *Parks* v. *Hall*, 2 Pick. 206, 211; *Rice* v. *Rice*, 4 Pick. 349; *Flagg* v. *Mann*, 14 Pick. 467, 478; *Eaton* v. *Green*, 22 Pick. 526. The case of *Flagg* v. *Mann* is explicit, not only upon the authority of the court thus to deal with the written instruments of the parties, but also upon the point of the competency of parol testimony to establish the facts by which to control their operation; although, upon consideration of the parol testimony in that case, the court came to the conclusion that there was a sale in fact, and not a mere security for a loan.

By the St. of 1855, c. 194, § 1, jurisdiction was given to this court in equity "in all cases of fraud, and of conveyances or transfers of real estate in the nature of mortgages." Gen. Sts. c. 113, § 2. The authority of the courts, under this clause, is ample. It is limited only by those considerations which guide courts of full chancery powers in the exercise of all those powers.

If then the advantage taken of the borrower by the lender, in requiring of him an agreement that he will forego all right of redemption in case of non-payment at the stipulated time, or an absolute deed with a bond or certificate back, which falsely recites the character of the transaction, representing it to be a sale of the land with a privilege of repurchase, be a sufficient ground for interference in equity by restricting the operation of the deed, and converting the writings into a mortgage, contrary to the expressed agreement, it is difficult to see why the court may not and ought not so interpose to defeat the same wrong, when it attempts to reach its object by the simpler process of an absolute deed alone. In each case the relief is contrary to the terms of the written agreement. In one case it is against the express words of the instrument or clause relied on as a defeasance, on the ground that those words are falsely written as a cover for the wrong practised, or an evasion of the right of redemption. In the other it is without an instrument or clause of defeasance, on the ground that it was oppressive and wrongful to withhold or omit the formal defeasance. In strictness, there is no defeasance in either case. The wrong on the part of the lender or grantor, which gives the court its power over his deed, is the same in both. "For they who take a conveyance as a mortgage without any defeasance are guilty of a fraud." *Cotterell* v. *Purchase*, Cas. temp. Talbot, 61. See also *Barnhart* v. *Greenshields*, 9 Moore P. C. 18; *Baker* v. *Wind*, 1 Ves. Sen. 160; *Mellor* v. *Lees*, 2 Atk. 494; *Williams* v. *Owen*, 5 Myl. & Cr. 303; *Lincoln* v. *Wright*, 4 De Gex & Jones, 16.

As a question of evidence, the principle is the same. In either case the

parol evidence is admitted, not to vary, add to, or contradict the writings, but to establish the fact of an inherent fault in the transaction or its consideration, which affords ground for avoiding the effect of the writings, by restricting their operation, or defeating them altogether. This is a general principle of evidence, well established and recognized both at law and in equity. *Stackpole* v. *Arnold*, 11 Mass. 27; *Fletcher* v. *Willard*, 14 Pick. 464; 1 Greenl. Ev. § 284; Perry on Trusts, § 226.

The reasons for extending the doctrine, in equity, to absolute deeds, where there is no provision for reconveyance, are ably presented by Hare & Wallace in their notes to *Woollam* v. *Hearn*, 2 Lead. Cas. in Eq. (3d Am. ed.) 676, and to *Thornbrough* v. *Baker*, 3 Ib. 624. See also Adams Eq. 111; 1 Sugd. Vend. (8th Am. ed.) Perkins's notes, pp. 267, 268, 302, 303. The doctrine thus extended is declared, in numerous decisions, to prevail in New York; also in Vermont and several other states. Mr. Washburn, in his chapter on Mortgages, § 1, has exhibited the law as held in the different states, in this particular; and the numerous references there made, as well as by the annotators in the other treatises which we have cited, render it superfluous to repeat them here. 2 Washb. Real Prop. (3d ed.) 35 *& seq.*

Upon the whole, we are convinced that the doctrine may be adopted without violation of the statute of frauds, or of any principle of law or evidence; and, if properly guarded in administration, may prove a sound and salutary principle of equity jurisprudence. It is a power to be exercised with the utmost caution, and only when the grounds of interference are fully made out, so as to be clear from doubt.

It is not enough that the relation of borrower and lender, or debtor and creditor, existed at the time the transaction was entered upon. Negotiations, begun with a view to a loan or security for a debt, may fairly terminate in a sale of the property originally proposed for security. And if, without fraud, oppression, or unfair advantage taken, a sale is the real result, and not a form adopted as a cover or pretext, it should be sustained by the court. It is to the determination of this question that the parol evidence is mainly directed.

The chief inquiry is, in most cases, whether a debt was created by the transaction, or an existing debt, which formed or entered into the consideration, continued and kept alive afterwards. "If the purchaser, instead of taking the risk of the subject of the contract on himself, take a security for repayment of the principal, that will vitiate the transaction, and render it a mortgage security." 1 Sugd. Vend. (8th Am. ed.) 302, in support of which the citations by Mr. Perkins are numerous. But any recognition of the debt as still subsisting, if clearly established, is equally efficacious; as the receipt or demand of interest or part payment. *Eaton* v. *Green*, 22 Pick. 526, 530.

Although proof of the existence and continuance of the debt, for which the conveyance was made, if not decisive of the character of the transaction as a mortgage, is most influential to that effect; yet the absence of such proof is far from being conclusive to the contrary. *Rice* v. *Rice*, 4 Pick. 349; *Flagg* v. *Mann*, 14 Pick. 467, 478; *Russell* v. *Southard*, 12 How. 139; *Brown* v. *Dewey*, 1 Sandf. Ch. 56. When it is considered that the inquiry itself is supposed to be made necessary by the adoption of

forms and outward appearance differing from the reality, it is hardly reasonable that the absence of an actual debt, manifested by a written acknowledgment or an express promise to pay, should be regarded as of more significance than the absence of a formal defeasance. It of course compels the party attempting to impeach the deed to make out his proofs by other and less decisive means. But as an affirmative proposition it cannot have much force.

A mortgage may exist without any debt or other personal liability of the mortgagor. If there is a large margin between the debt or sum advanced and the value of the land conveyed, that of itself is an assurance of payment stronger than any promise or bond of a necessitous borrower or debtor. Hence inadequacy of price, in such case, becomes an important element in establishing the character of the transaction. Inadequacy of price, though not of itself alone sufficient ground to set in motion chancery powers of the court, may nevertheless properly be effective to quicken their exercise, where other sufficient ground exists; Story Eq. §§ 239, 245, 246; and in connection with other evidence may afford strong ground of inference that the transaction purporting to be a sale was not fairly and in reality so. Kerr on Fraud and Mistake, 186 and note; *Wharf* v. *Howell*, 5 Binn. 499.

Another circumstance, that may and ought to have much weight, is the continuance of the grantor in the use and occupation of the land as owner, after the apparent sale and conveyance. *Cotterell* v. *Purchase*, Cas. temp. Talbot, 61; *Lincoln* v. *Wright*, 4 De Gex & Jones, 16.

These several considerations have more or less weight, according to the circumstances of each case. *Conway* v. *Alexander*, 7 Cranch, 218; *Bentley* v. *Phelps*, 2 Woodb. & Min. 426. It is not necessary that all should concur to the same result in any case. Each case must be determined upon its own special facts; but those should be of clear and decisive import.

In the present case, we are able to arrive at the clear and satisfactory conclusion that there was no real purchase of the land by the defendant, either from Tirrill or from the plaintiff; that his advance of the purchase money at the request of the plaintiff created a debt upon an implied assumpsit, if there was no express promise; and that it was the expectation of both parties that the money would be repaid soon and the land reconveyed. Whatever may have been the intention of the defendant, he must have known that this was the expectation of the plaintiff; and it is most favorable to him to suppose that it was his own expectation also. These conclusions are not in the least modified in his favor by an examination of his answer.

We must declare therefore that in equity he holds the title subject to redemption by the plaintiff in such manner and upon such terms as shall be determined upon a hearing therefor before a single justice.

Decree accordingly.

SUPREME COURT OF TENNESSEE.

[OCTOBER TERM, 1873.]

FOREIGN JUDGMENT. — NUL TIEL RECORD. — WANT OF NOTICE TO DEFENDANT.

ABRAHAM BARNETT v. *L. OPPENHEIMER.*

When a judgment obtained in one state is sought to be enforced in another, it is competent for the courts of the latter, under a plea of nul tiel record, *to determine whether such service was made upon the defendant in the original action as to give the court jurisdiction of his person.*

DEADERICK, J. This is an action of debt instituted in the law court of Memphis, upon the record of a judgment of a circuit court of Mississippi. Defendant below (Barnett) pleaded *nul tiel record* and payment. After one verdict and judgment in favor of defendant, a new trial was granted, which resulted in a verdict in favor of plaintiff, and defendant has appealed in error to this court. The argument of counsel here has been mainly addressed to the question of the validity of the record of the judgment, which is the foundation of this suit. For plaintiff in error it is insisted that the record sued on shows upon its face that defendant had no notice, actual or constructive, of the existence of the suit against him, and that this court must hold the judgment void for want of jurisdiction of the person. While, on the other hand, it is insisted that the judgment, having been rendered by a court of competent jurisdiction in such cases, its jurisdiction can no more be inquired into by the courts of this State, than the correctness of the judgment upon the merits. The statutes of Mississippi require that original process shall be served personally on the defendant, if to be found, and a true copy thereof delivered to him. If the defendant cannot be found, such process may be served by leaving such copy at his usual place of abode, with his wife, or some free white person above the age of sixteen years, then and there being a member of his family, &c.

The record in question shows that on the 18th of May, 1860, a declaration of complaint was filed in the office of the clerk of the circuit court of Sunflower County, Mississippi, and thereupon a summons was issued, which was returned indorsed as follows: "Received May 28, 1860. Executed this writ May 30, 1860, by leaving a true copy thereof with ——, a free white person, found at his usual place of residence in this county, defendant not being found. Eli Waites, sheriff, by G. H. Bryant, special deputy." Then follows, at the December term, 1860, a judgment by default, for $1,050.08.

From the sheriff's return, it is manifest that the personal service of the writ was not effected, and we think it equally clear that no constructive notice was given, nor does the record anywhere recite that the defendant appeared, or that he was summoned to appear. It is not a case of defective service of process, but one of a total want of service, a distinction

clearly recognized in the case of *Harrington* v. *Wofford*, 46 Miss. R. 41, where it is said: "There is a very clear and obvious distinction between a total want of service of process, and a defective service, as to their effect in judicial proceedings. In the one case the defendant has no notice at all of the suit or proceedings against him. The judgment or decree in such cases, it is conceded, is *coram non judice* and void, upon the principles of law and justice. In the other case the defective service of process gives the defendant actual notice of the suit or proceedings against him, and the judgment or decree in such case, although erroneous, would be valid, until reversed by a direct proceeding in an appellate jurisdiction, and its validity cannot be called in question." The same distinction is recognized between a void and a voidable judgment, or an irregular or defective service and no service at all, in same book, page 675, and in 41 Miss. 562. In the last named case Judge Ellett, delivering the opinion of the court says:—

"Where judgment in default is taken upon a return which purports to show that the process has been actually executed, such judgment is valid and binding whenever it comes collaterally in question, although the defendant might reverse it upon a writ of error, on the ground of the insufficiency of the return." In the case under consideration, there was no personal service of notice, nor any constructive notice, so that according to the case in 46 Miss. 41, the judgment rendered in Mississippi is void there, and this is so whether defendant was or was not a resident or inhabitant of that State at the time of the rendition of the judgment. The Constitution of the United States declares, "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof." Article four, section one.

Pursuant to this authority, Congress enacted "That the said record and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." Act of May 26, 1790. If, therefore, the judgment in this case is a valid judgment, which the court in Mississippi had the jurisdiction to pronounce, it is equally valid and binding here. But it is insisted by the counsel for the defendant in error that the question of jurisdiction of the person of the defendant is just as legitimate for the determination of the court rendering the judgment sued on, as any other question arising in the cause, and when determined, as it necessarily is in the rendition of the judgment, it is conclusive, and cannot be inquired into in a collateral proceeding. Authorities have been cited which fully sustain the proposition of the counsel. In the notes of the two cases of *Mills* v. *Duryee*, and *McElmoyle* v. *Cohen* (2 Am. Lead Cases), many cases in the United States and state courts are cited, which show conflict and differences in the holdings of those courts. While many of them fully sustain the proposition of the counsel for defendant in error, as before stated, other authorities equally as decisively announce the doctrine that, upon the plea of *nul tiel record*, the court should inspect the record, and determine for itself whether the court trying the cause had jurisdic-

tion of the person of the defendant. If defendant had no notice, actual or constructive, of the proceedings against him, it would be alike contrary to natural justice and to law to hold him liable. A judgment pronounced against a person under such circumstances is null and void, and is so declared by the courts of Mississippi, and have been so declared repeatedly by our own courts. To hold, therefore, that the courts of this State may not declare a judgment of Mississippi void, which the adjudications of that State declare void, would be to give greater faith and credit to the proceedings of the courts of that State by our own courts, than her own courts would give. The plea of *nul tiel record* properly raises the question of the existence of the record sued on, and this plea is triable by the court; and when, on inspection of the record, it appears that the party sued in this State was not before the court at the trial, and that the court never had jurisdiction of his person, he having had no notice of the suit nor opportunity to defend it, it is in fact no record as to him, and he is not bound by the judgment therein rendered. Whether the court had jurisdiction of the person may be tried and determined by the court before whom the suit upon the record is brought. And this power, which has been asserted and exercised by our own courts, is not in violation of the act of Congress of 1790. In Sto. on C. L. § 609, it is said that "judgments in state courts have the same force and effect in other states as in the state in which they are rendered;" and adds: "This does not prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered." To the same effect are the cases in 9 Mass. 462, 14 Howard (U. S.), *Harris* v. *Hardeman*, p. 337, where numerous cases are referred to and reviewed. In the case of *Moren* v. *Killibrew* (2 Yerg. 376), Judge Whyte, delivering the opinion of the court, declares that void judgments have no operation whatever, while voidable judgments are valid until reversed; and, while disclaiming any right to determine whether the court of a sister state had rendered a correct or erroneous judgment upon the subject matter before it, very clearly asserts the power of a court of this State, when called upon to enforce the judgment of the court of another state, to inquire into the jurisdiction of the court rendering the judgment sought to be enforced. These authorities and others which might be cited, fully sustain what we regard as the safer and more just rule upon the subject, *i. e.*, that when a judgment from another state is sought to be enforced in the courts of this State, it is competent to our tribunals upon the plea of *nul tiel record* to determine whether the court rendering the judgment sought to be enforced had jurisdiction of the person against whom the judgment is rendered, and of the subject matter of the suit. It results that the judgment of the law court at Memphis was erroneous, and must be reversed, and this court, rendering here such a judgment upon the plea of *nul tiel record* as the court below should have rendered, sustain the plea and dismiss the suit at the cost of plaintiff below. The judgment of the court in favor of defendant upon his plea of *nul tiel record* is decisive of the case, and makes it unnecessary to remand the cause for a trial upon what is now the immaterial plea of payment.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1873.]

NEGLIGENCE. — LIABILITY OF MASTER TO SERVANT.

UNION PACIFIC RAILROAD COMPANY v. *JESSE L. FORT.*

A boy was employed in the machine shop of a railroad company as a workman, — under the direction of the company's foreman and required to obey his orders; the boy, by the order of the foreman, ascended a ladder among dangerous machinery for the purpose of adjusting a belt, and while endeavoring to adjust the belt his arm was torn off by the machinery; the jury having found that the adjusting of the belt was not within the scope of the boy's duty and employment, but was within that of the foreman; that the order was not a reasonable one; that its execution was attended with hazard to life or limb, and that a prudent man would not have ordered the boy to execute it. Held, that the rule that a master was not responsible to one servant for an injury caused by the negligence of a fellow-servant was not applicable, and that the company was liable.

ERROR to the circuit court of the United States for the District of Minnesota. The facts of the case and the special verdict will be found in 2 Dillon C. C. R. 259.

Redick & Briggs, for the plaintiff (Fort).

Poppleton & Wakely, for the railroad company.

Mr. Justice DAVIS delivered the opinion of the court.

It was assumed on behalf of the plaintiff in error, on the argument of this cause, that the master is not liable to one of his servants for injuries resulting from the carelessness of another, when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury. Whether this proposition as stated be true or not, we do not propose to consider, because, if true, it has no application to this case.

The action was brought by the defendant in error to recover damages for an injury to his minor son, resulting in the loss of an arm, while in the employment of the railroad company. The boy was employed in the machine shop of the company as a workman or helper, under the superintendence and control of one Collett, and had been chiefly engaged in receiving and putting away mouldings as they came from a moulding machine. After the service had been continued for a few months, the boy, by the order of Collett, ascended a ladder to a great height from the floor, among rapidly revolving and dangerous machinery, for the purpose of adjusting a belt by which a portion of the machinery was moved, and while engaged in the endeavor to execute the order the accident happened. The jury, by a special verdict, find that the boy was engaged to serve under Collett as a workman or helper, and was required to obey his orders; that the order by Collett to the boy (in carrying out which he lost his arm) was not within the scope of his duty and employment, but was within that of Collett's; that the order was not a reasonable one;

that its execution was attended with hazard to life or limb, and that a prudent man would not have ordered the boy to execute it.

It is apparent, from these findings, if the rule of the master's exemption from liability for the negligent conduct of a co-employé in the same service be as broad as is contended for by the plaintiff in error, that it does not apply to such a case as this. This rule proceeds on the theory that the employé, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking, among which are to be counted the negligence of fellow-servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employé in a subordinate position for any injury caused by the wrongful conduct of the person placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employés of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason and cannot receive our sanction.

The injury in this case did not occur while the boy was doing what his father engaged he should do. On the contrary, he was at the time employed in a service outside the contract and wholly disconnected with it. To work as a helper at a moulding machine, or a common work-hand on the floor of the shop, is a very different thing from ascending a ladder resting on a shaft, to adjust displaced machinery, when the shaft was revolving at the rate of 175 to 200 revolutions per minute. The father had the right to presume, when he made the contract of service, that the company would not expose his son to such a peril. Indeed, it is not possible to conceive that the contract would have been made at all if the father had supposed that his son would have been ordered to do so hazardous a thing. If the order had been given to a person of mature years, who had not engaged to do such work, although enjoined to obey the directions of his superior, it might with some plausibility be argued that he should have disobeyed it, as he must have known that its execution was attended with danger; or, at any rate, if he chose to obey, that he took upon himself the risks incident to the service. But this boy occupied a very different position. How could he be expected to know the peril of the undertaking? He was a mere youth, without experience, and not familiar with machinery. Not being able to judge for himself, he had a right to rely on the judgment of Collett, and doubtless entered upon the execution of the order without apprehension of danger. Be this as it may, it was a wrongful act on the part of Collett to order a boy, of his age and inexperience, to do a thing which in its very nature was perilous, and which any man of ordinary sagacity would know to be so. Indeed, it is very difficult to reconcile the conduct of Collett with that of a pru-

dent man, having proper regard to the responsibilities of his own position and the rights of others. It is charitable to suppose that he did not appreciate the danger, and acted without due deliberation and caution. For the consequences of this hasty action, the company are liable, either upon the maxim of *respondeat superior*, or upon the obligations arising out of the contract of service. The order of Collett was their order. They cannot escape responsibility on the plea that he should not have given it. Having intrusted to him the care and management of the machinery, and in so doing made it his rightful duty to adjust it when displaced, and having placed the boy under him with directions to obey him, they must pay the penalty for the tortious act he committed in the course of the employment. If they are not insurers of the lives and limbs of their employés, they do impliedly engage that they will not expose them to the hazard of losing their lives, or suffering great bodily harm, when it is neither reasonable nor necessary to do so. The very able judge who tried the case instructed the jury on the point at issue in conformity with these views, and we see no error in the record. 2 Dillon C. C. R. 259.

The judgment is affirmed.

Mr. Justice BRADLEY dissented.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

[TO APPEAR IN 109 MASS.]

INSANE PERSON. — GUARDIAN. — ALLOWANCE FOR SUPPORT OF WARD.

MAY v. *MAY*.

A man of wealth and having no family dependent on him, under guardianship as insane, should be allowed those luxuries which he desires and can enjoy, which are unobjectionable in themselves and would be proper and reasonable expenditures for a sane man in a similar position.

A guardian of an insane man whose estate was worth over $200,000 *spent four hours three times a week in visiting and dining with his ward, and superintending the management of his house and grounds; and the ward's spirits and condition were much improved by the visits. Held, that a monthly charge of* $100 *for personal services, besides a commission of five per cent. on the income collected, should be allowed to the guardian; but that an additional charge of* $100 *for attending court should be disallowed, as should also a charge of* $200 *for attending the ward on two journeys of a fortnight each, which were undertaken partly on account of the guardian's own business.*

The additional compensation, if any, allowed to a guardian for changing investments of his ward's property, or making repairs thereon, should not be by way of commissions on the amount invested or expended.

A guardian who makes up his accounts monthly may charge his ward's estate each month with his commissions on the amount collected in that month, and with a month's interest on a balance from the preceding month in his own favor, and may carry the balance to the next month.

THE FIRST of these cases was an appeal by Josephine May, Ernestine May, James B. Bradlee and his wife Mary P. Bradlee, George P. May, and Edwin May, next of kin of Frederick May, an insane person, from a decree of the judge of probate, rendered March 22, 1870, authorizing Frederick W. G. May, his guardian, to build a stable on the estate of the ward at an expense not exceeding $10,000, and to sell personal estate of the ward sufficient to defray the expense. The reasons of the appeal were, that the expenditure was extravagant, and was not needful for the comfort of the ward.

The second case was an appeal by the same persons from a decree of the judge of probate, rendered February 8, 1870, allowing the third account of the guardian. The reasons for the appeal were, that the amounts charged in the account for the services, commissions, and expenses of the guardian, in the care of the person and property of his ward, were excessive and unreasonable.

Both appeals were heard in June, 1871, before Ames, J., who reported the evidence and all questions of law therein for the determination of the full court. The following is the substance of the report: —

Many witnesses were called and examined by the appellee, and cross-examined by the appellants. No witnesses were called by the appellants.

It appeared that in 1844 Joseph Ballard was appointed guardian of Frederick May, and by the inventory then filed by him the ward's property amounted to $92,748; that in 1862 Ballard was removed, and the next year the appellee was appointed guardian, and by the inventory then filed the ward's property amounted to $202,025; that the appellee filed his second account on September 1, 1865, which showed a balance due to him from his ward of $8,510, and was duly allowed; that the account now in question was filed on July 1, 1868, thus covering a space of thirty-four months, and showed a balance due to the guardian of $15,382; that the amount due to him remained about the same at the time of the hearing, and the debts then due from the ward's estate to other persons amounted to about $12,000; that the property of the ward, as inventoried at the time of the filing of this account, was $207,977, including a parcel of real estate of six acres in Medford, on which the ward lived, which was inventoried at $40,000, its cost, and would now sell for only $25,000 or $30,000, but including also other property which was worth more than the inventoried value; that the annual income of the ward, during the time covered by this account, was about $14,000 a year, from which repairs, taxes, insurance, and interest on debt were to be deducted; that the ward was a bachelor, about sixty-five years old, not fit to take care of himself or his property, but of peaceable disposition, of considerable intelligence, and very fond of animals, especially of horses; that his principal amusement was driving; that the stable at present on his estate was too small to hold his horses and carriages, and wholly out of keeping with his house and the rest of his establishment; that the stable which it was proposed to build was to be of brick, covering 2,220 square feet of ground, and twenty-five feet high to the ridge pole, and would cost about $10,000; that it would increase the value of the estate, though not to the extent of its cost; that the ward was intensely interested in having the new stable built, and complained bitterly of his present stable; that he was not on

terms of intimacy or even friendship with any of his next of kin; that Edwin May, one of the appellants, was dead; and that the other appellants were persons of large fortune except George P. May, who had a wife and two children and a settled income of $2,000 a year.

The account in question showed that the gross amount collected during the time covered by it was $39,658, and the appellee charged a commission of five per cent. thereon, amounting to $1,982.90, as appeared by the first item in a statement made up from the account.

The appellee, in the account, charged $100 a month for personal services, as appeared by the fourth item in said statement. It appeared that he visited and dined with his ward three times a week, travelling from Boston to Medford and spending four hours each time, one of which was passed in the travelling; that the ward had a housekeeper at a salary of $1,000 a year, who took care of the house, but the appellee took charge of all out-of-door matters and the affairs of the ward generally; and that the spirits and mental condition of the ward had greatly improved while he had been under the guardianship of the appellee.

The appellee charged $100 for attendance at the probate court and at this court, and also $200 for attending his ward on two journeys, of a fortnight each, one in September, 1866, and the other in June and July, 1867, as appeared by the fifth item in said statement. The appellee testified that he took these journeys for business of his own; that the ward wanted to go with him; that had he gone on his business alone he would not have been away more than two or three days each time; and that he extended the trips on his ward's account.

The appellee charged in his account $114 as a commission of three per cent. on a sale of real estate for $3,800, and investment of the proceeds, as appeared by the second item in said statement.

The account showed that during the time covered by it $20,084 were spent in remodelling the ward's house, and $2,702 in repairs on other estates, and on these two sums the appellee charged a commission of five per cent., amounting to $1,139.30, as appeared by the third item in said statement.

The account was made up monthly, the appellee crediting the ward's estate with the amounts collected by him, and charging it with the amount expended for the ward, and also with his own commissions for the monthly collections, and a month's interest on the balance due to him from the estate at the end of the preceding month. The balance, which was always in his favor, was carried to the next month.

T. H. Sweetser & G. W. Phillips, for the appellee.

E. D. Sohier & C. A. Welch, for the appellants.

AMES, J. The ward in this case is an unmarried man, about sixty-five years of age, and the owner of a large amount of property, yielding an income of at least $12,000 annually. Nobody can be said to be dependent upon him, or to have an interest in the final disposition of his estate, in any such sense as to need any special or peculiar protection from the law. His immediate relatives are all of them persons of large property, and he does not appear to be connected with any of them by any close ties of intimacy or friendship. He is put under guardianship, partly for the constant direction and care of his personal habits, and attention to his wants,

and partly because he has not sufficient intelligence for the transaction of business and the management of his property. The guardian is appointed for the welfare, comfort, and security of the ward; and not for the increase of the estate in his hands by accumulations from the income, in order to enlarge the wealth of remote or collateral relatives who may ultimately succeed to the inheritance. It is no part of his duty to diminish the reasonable comforts of his ward, or to prevent him from enjoying such luxuries, or indulging such tastes, as would be allowable and proper in the case of a man similarly situated in other respects, but in the full possession of his faculties.

In *Oxenden* v. *Compton*, 2 Ves. Jr. 69, Lord Eldon says that in the management of the estate the guardian should attend "solely and entirely" to the interest of the owner, without looking to the interest of those who, upon his death, may have eventual rights of succession; "and nothing could be more dangerous or mischievous than for him to consider how it would affect the successors," as the ward is the only person he is bound to take care of. He adds that the court will always shut out of view all eventual interests, and will consider only the immediate interests of the person under its care. To the same general effect are the other cases cited by the appellee, of *Ex parte Baker*, 6 Ves, 8; *Dormer's case*, 2 P. W. 262; *Ex parte Whitbread*, 2 Meriv. 99; *In re Persse*, 3 Molloy, 94; *Kendall* v. *May*, 10 Allen, 59.

The case finds that the ward is fond of domestic animals; that the keeping and use of horses is the principal comfort and enjoyment of his life, if not absolutely necessary to his health; and that the stable accommodations which he now has are scanty, and not at all in keeping with his dwelling-house and domestic establishment generally. Under such circumstances, the question is not whether the proposed outlay for the construction of the new stable is strictly judicious and expedient in an economical sense; nor whether a trustee, acting for the benefit of minors, and bound to increase the fund in his hands by all proper means, would be justified in incurring such an expenditure; but whether it would be unreasonable and extravagant to allow such an investment from this particular estate. We do not think that when the management of the property is taken out of the ward's hands for his own good, the law intends to deprive him of the enjoyment of his wealth, except so far as the necessity of the case absolutely requires. We see no reason why the wishes and tastes of the ward may not properly be considered in such cases, provided the expenditure is for a purpose that is unobjectionable in itself and can be afforded without material inconvenience to his financial position, especially where there is neither wife nor child whose interests can be affected unfavorably. It could not be said to be an unreasonable expenditure for a man of like fortune and circumstances not under guardianship; and we think that the fact of guardianship furnishes no sufficient ground, in the present case, for its disallowance. The decree of the judge of probate in this respect is therefore affirmed.

With regard to the guardian's account, the charge of five per cent. upon the gross amounts collected is not objected to by the appellants. The charge of one hundred dollars per month, for the services of the guardian in the personal charge of the ward, although apparently somewhat large,

is in our opinion justified by the evidence. This item, as we *understand it*, does not apply to the services of the guardian in the management of the property. The evidence satisfies us that the visits of the guardian to the ward, which were very frequent and occupied a large portion of the guardian's time, were of great benefit and advantage to the ward, have greatly improved his condition, and are not overcharged in the guardian's account. But these two items of charge appear to us to furnish a full compensation for the ordinary duties of the trust, and for the time devoted to personal attentions and services directly to the ward. We disallow therefore the charges for extra attendance of the guardian at court and for his personal attendance upon the ward in two journeys.

With regard to the sale of real estate and the reinvestment of its proceeds, and also with regard to the remodelling of the dwelling-house and the repairs of other estates, we are of opinion that the allowance of compensation in the shape of a commission upon the amount expended is objectionable. It is contrary to public policy, and in conflict with the true nature *and purpose of such* trusts, that a guardian should be a gainer by frequent changes of investment, or that his compensation should be increased by increasing the amount of expenditures on the ward's account. Any specific services, not included in the ordinary range of the guardian's duties, may be charged in his account, and it will be the duty of the judge of probate to make such reasonable allowance for them as their importance and difficulty might require. The true principle would be, adequate reward according to the circumstances of the case. *Post* v. *Jones*, 19 How. 150. We should however be very unwilling to sanction the practice of putting that compensation in the form of a commission upon the *amount* expended or reinvested, and therefore we cannot allow these charges in their present form.

As the guardian has adopted a system of monthly accounts, carrying the balance forward every month to the next succeeding account, it does not appear to us that his monthly charge of interest is open to objection.

Decree reversed as to all items except the first and fourth.

SUPREME COURT OF CALIFORNIA.

[JANUARY TERM, 1874.]

CRIMINAL LAW. — ONCE IN JEOPARDY.

PEOPLE v. *CAGE.*

The defendant having been indicted for murder, a jury was duly empanelled and sworn; evidence was introduced and the case was submitted to the jury on the 30th of July. The jury remained together until the evening of the 2d of August, when the court ordered the sheriff to proceed to the door of the jury room and inquire of them if they had agreed upon a verdict, to which they replied that they "had not, and could not agree on a verdict;" whereupon the court was adjourned for

the term. The term would not have expired by operation of law until the evening of the next day. Held, that the defendant by these proceedings had been placed in jeopardy, and that they therefore operated as a verdict of acquittal.

Under the provision of the Penal Code of California, the defendant upon being placed again on trial had a right to introduce evidence of the above facts under the plea of not guilty.

APPEAL from the district court of the Fifteenth Judicial District, county of Los Angeles.

Kewen & Howard, for appellant.

Attorney-General *Love*, for respondent.

Opinion by NILES, J., — RHODES, J., MCKINSTRY, J., CROCKETT, J., concurring.

The defendant was tried and convicted in the district court for the county of Los Angeles, in the month of April, 1873, of the crime of murder in the first degree. The leading question made upon the appeal relates to the legal effect of the proceedings had at a former trial of the cause in the same court, at the June term, 1872. These proceedings, as shown by the bill of exceptions, were as follows: The case was regularly brought on for trial at that term. A jury was duly empanelled and sworn; evidence was introduced, and the case was submitted to the jury on the 30th of July. The jury remained together until the evening of the 2d of August. The proceedings of that day, as far as they pertain to the question before us, are shown by the following extract from the minutes of the court: —

"In this cause, counsel for the defence having been called and appearing (counsel for plaintiff failing to answer) in open court, the court ordered the sheriff to proceed to the door of the jury room where the jury in this case were under deliberation, and inquire of them if they had agreed upon a verdict, to which they replied that they 'had not, and could not agree on a verdict,' and the sheriff thereupon reported their reply to the court. Whereupon the court was ordered to be adjourned for the term, and the same was accordingly done by the sheriff."

The term would not have expired by operation of law until the evening of the ensuing day.

The defendant's counsel offered to prove the foregoing facts in support of motion for a judgment of acquittal and discharge, made at the time the defendant was put upon his second trial. The motion having been denied, the defendant's counsel tendered a plea reciting substantially the same facts, which plea the court refused to accept. At the trial the defendant offered to prove the same facts under the plea of not guilty, and the testimony was excluded by the court.

There is no doubt as to the general rule that whenever a person has been placed upon trial, upon a valid indictment, before a competent court, and a jury empanelled, sworn, and charged with the case, he is then in jeopardy within the meaning of the constitutional provision which declares that "no person shall be subject to be twice put in jeopardy for the same offence;" and that the discharge of the jury without verdict, unless by consent of the defendant, or from some unavoidable accident or necessity, is equivalent to an acquittal. Among these unavoidable necessities are

recognized the inability of the jury to agree after a reasonable time for deliberation, and the close of the term of the court. Unquestionably this defendant was placed in jeopardy at the first trial, and is entitled to the protection of the constitutional provision, unless one or the other of these necessities existed.

1. The power of the court to discharge a jury, by reason of their inability to agree upon a verdict, is undisputed. It was so held in the case of *Ex parte McLaughlin*, 41 Cal. 212. But it was also held that "it must be exercised in accordance with established legal rules, and sound legal discretion in the application of such rules to the facts and circumstances of each particular case." It is evident that in a matter so gravely affecting the life or liberty of the accused, the discretion of the court should be exercised upon some kind of evidence, and its judgment should be expressed in some form upon the record. In this case there was no evidence upon which the court was authorized to act, and no apparent adjudication. The sheriff was ordered "to proceed to the door of the jury-room and inquire of them if they had agreed upon a verdict." The extent of his official duty was to receive their reply to this question and report it to the court.

His report of the further answer of the jury that they "could not agree on a verdict," was extra official, and was no evidence whatever upon which the court could act. If the jury were in fact unable to agree, they should have been called into court, and have announced their inability in the presence of the court and of the defendant. In the absence of this, or some equivalent showing, the court was not authorized to make an order of discharge upon this ground.

Nor was there any adjudication whatever upon this subject. It does not appear to have been determined by the court in any way that the jury were unable to agree. There was no order of discharge of the jury, other than that resulting from the adjournment of the court for the term. There is nothing in the case to show the existence of that inability to agree, which has been held to constitute that necessity which authorizes a discharge of a jury before verdict, and deprives the accused of his exemption from a second trial.

2. There is no doubt that the adjournment of the court for the term operated to discharge the jury. That effect is given to a final adjournment by section 413 of the criminal practice act, under which this trial was had. Nor can there be any doubt of the power of the court to adjourn finally before the expiration of the term limited by statute for its continuance. But it is claimed by the counsel for appellant that there was in this case no such legal necessity for the adjournment, and the consequent discharge of the jury, as would prevent him from insisting upon his former jeopardy, in bar of a second trial. And in this we agree with the counsel.

Whenever the time fixed by law for the expiration of a term arrives, the powers of the court for that term are at an end by operation of law, and the powers of the jury must terminate with those of the court to which it was attached. Here the legal necessity for the discharge is apparent, and has been frequently recognized by the courts. It is placed upon the same footing as a discharge occasioned by the illness or death

of a juryman or of the judge. But there is, presumably, no necessity for the final adjournment of the court before the fixed limit of the term is reached. If such an adjournment is had pending the trial of a criminal cause, the necessity must exist and should appear, in order to rebut the presumption of jeopardy arising from the fact of the trial. If this were otherwise, the court might be adjourned immediately after the jury had retired from the box, and before an agreement was possible. The right which the constitution intends to assure to the accused when put upon trial — to either have a verdict rendered in his case, or go free — would be made to depend upon the arbitrary discretion of the judge.

Mr. Bishop, in his work upon criminal law, after an exhaustive review of the authorities, and a discussion of the whole subject, arrives at these conclusions: "Whenever, after a trial has commenced, whether for misdemeanor or felony, the judge discovers any imperfection which will render a verdict against the defendant either void or voidable by him, he may stop the trial, and what has been done will be no impediment in the way of future proceedings. Whenever, also, anything appears showing plainly that a verdict cannot be reached within the time assigned by law for the holding of the court, he may adjudge this fact to exist, and on making the adjudication matter of record, stop the trial, with the like result as before. But without the adjudication, the stopping of the trial operates to discharge the prisoner. In other words, when the record shows the defendant to have been in actual jeopardy, he is protected thereby from further peril for the same alleged offence. But when it shows also, in addition to this, something which disproves the peril, it does not show the peril, whatever else it shows, and therefore it does not protect him." 1 Bish. Cr. Law, section 873.

These views are fully justified by the authorities cited in their support, and the conclusions cannot well be avoided. We are of the opinion that the discharge of the jury at the first trial of this cause was equivalent to a verdict of acquittal, and it only remains to determine in what manner the defendant should be permitted to avail himself of the right.

By section 1016 of the Penal Code, three kinds of pleas to an indictment are provided for: First, guilty; second, not guilty; third, a former judgment of acquittal or conviction of the offence charged. The defence, that the defendant has been before in jeopardy, if it be, as we hold, sufficient, must be taken advantage of under one or the other of these pleas. It would seem that the more convenient method of interposing a defence of this nature would be by a plea analogous to a plea of former acquittal, of which it is said to be the equivalent. But we find no authority in the statute for a plea of this kind. The case falls rather within the purview of section 1020 of the Penal Code, which declares that "all matters of fact tending to establish a defence, other than that specified in the third subdivision of section 1016, may be given in evidence under the plea of not guilty." We hold that under the plea of not guilty the evidence of the facts attending the first trial, as disclosed by the record, should have been received. For the error of the court in rejecting this evidence, the judgment must be reversed and the cause remanded for a new trial, and it is so ordered.

February 6.

Chief Justice WALLACE, dissenting. The former trial of this cause took place in June, 1872, and the case was given to the jury on the 30th of July, and on the same day they returned into court for further instructions, which, being given, they again retired to deliberate upon their verdict, but on the same day reappeared in court and stated their inability to agree upon a verdict, but the court then declined to discharge them. Their deliberations continued during the 31st of July and until the first day of August, on which day they again appeared in court and announced to the court that they could not agree upon a verdict and that they saw no chance for an agreement. The court offered to repeat to them the instructions already given, but they, not desiring to again hear the instructions, were again sent out for further deliberation. On August 2d, it having been reported to the court that one of the jurors was too ill to serve further, the jury were again brought into court, when, it appearing that the indisposition of the juror was not of a serious character, the jury were again sent out for further deliberation. At 7.30 P. M. of the same day, the jury not having returned a verdict, the court sent the sheriff to inquire of them if they had yet agreed upon a verdict, and that officer reported to the court that the jury "had not and could not agree on a verdict." Upon receipt of this information the court was adjourned for the term, which adjournment, of course, operated a discharge of the jury. Undoubtedly it would have been better practice to have called the jury into open court, and there discharged them in the due and usual form of law, and had that been done, and had the court entered it of record that they were discharged, because of their inability to agree upon a verdict, I do not understand that, in the view of my associates, such a discharge would have operated as a bar to further proceedings on the indictment by the empanelling of another trial jury, for the jury had deliberated of the verdict from the 30th of July to the 2d of August, inclusive — some four days in all. Their discharge under such circumstances, if regularly made and entered of record, could not have been rightfully complained of by the prisoner, nor would it have operated to free him from further prosecution before another jury thereafter.

If, then, upon these facts equally transpiring at the first trial, and which were then entered and now appear of record, the district court would have been justified in discharging the jury by an order entered in due form, I think that the prisoner cannot allege jeopardy merely because of the irregular manner in which the discharge of the jury was effected in this case. The substance of the whole proceeding is, in short, that it distinctly appeared to the district court that the jury had not agreed after some four days' actual deliberation, and it further appeared that at the time of the discharge of the jury there was no probability of their agreeing, and I am of opinion that an order made under these circumstances, which operated their discharge, must be considered to have been made (even though not so expressed *in form*) because of their *ascertained inability to agree upon a verdict*, and that, upon settled principles of law, a discharge of the jury under such circumstances should not operate an acquittal of the prisoner.

I must, therefore, dissent from the opinion of my associates upon this point.

SUPREME COURT OF PENNSYLVANIA.

[FEBRUARY 16, 1874.]

NEGLIGENCE OF BAILEE. — GRATUITOUS DEPOSIT.

SCOTT ET AL. v. *THE NATIONAL BANK OF CHESTER VALLEY.*

The plaintiffs deposited bonds with the defendants for safe keeping, for the benefit of the plaintiffs and without compensation. The bonds were stolen by the defendants' teller. Held, that the defendants were not liable except for gross negligence; and that the fact that the teller had been abstracting the funds of the bank for two years and to the amount of $26,000, *and had kept false accounts, and was supposed to remain in his employment after it was known that he had dealt in stock, did not constitute such negligence as to render the defendants liable.*

ERROR to the court of common pleas of Chester County.

AGNEW, C. J. As early as the case of *Tompkins* v. *Saltmarsh*, 14 S. & R. 275, it was decided that a delivery of a package of money to a gratuitous bailee, to be carried to a distant place and delivered to another for the benefit of the bailor, imposes no liability upon the bailee for its safe keeping, except for gross negligence. In that case, the package was stolen from the valise of the bailee, at an inn in the course of his journey, after it had been carried to his room, in the usual custom of inns in that day (1822). The same rule is laid down by Justice Coulter, *arguendo*, in *Lloyd* v. *West Branch Bank*. He says, a mere depositary, without any special undertaking, and without reward, is answerable for the loss of the goods only in case of gross negligence, which, in its effects on con tracts, is equivalent to fraud. He further remarks, that the accommodation here was to the bailor, and to him alone, and he ought to be the loser, unless he in whom he confided, the bank or cashier, had been guilty of bad faith in exposing the goods to hazards to which they would not expose their own. These rules he derives from *Coggs* v. *Bernard*, 2 Lord Raymond, 909 (1 Smith's Lead. Cas. part I. 369, ed. 1872); and *Foster* v. *Essex Bank*, 17 Mass. 501. In the latter case, the law of bailment was exhaustively discussed by Parker, C. J., and the conclusions were as above stated. It was further held that the degree of care which is necessary to avoid the imputation of bad faith, is measured by the carefulness which the bailee uses towards his own property of a similar kind. When such care is exercised, the bailee is not answerable for a larceny of the goods, by the theft even of an officer of the bank. It is further said, that from such special bailments, even of money in packages, for safe keeping, no consideration can be implied. The bank cannot use the deposits in its business; and no such profit or credit from the holding of the money can arise as will convert the bank into a bailee for hire or reward of any kind. The bailment in such case is purely gratuitous, and for the benefit of the bailor, and no loss can be cast upon the bank for a larceny, unless there has been gross negligence in taking care of the deposit. These appear to be just conclusions, drawn from the nature of the bailment. The rule in

this State is stated by Thompson, C. J., in *Lancaster Bank* v. *Smith*, 12 P. F. Smith, 54. He says: "The case on hand was a voluntary bailment, or, more accurately speaking, a bailment without compensation, in which the rule of liability for loss is usually stated to arise on proof of gross negligence." That case went to the jury on the question of ordinary care, and hence the observation of the chief justice, that the same idea was sufficiently expressed by the judge below in using the words, want of ordinary care. It may be proper, however, to say, that want of ordinary care is applicable to bailees with reward, when the loss arises from causes not within the duty imposed by the contract of safe keeping, as from fire, theft, &c., and hence is not the measure in such a case as that before us, which we have seen is gross negligence.

That case was one where the teller of the bank delivered the deposited bonds to a stranger, calling himself by the name of the bailor, without taking sufficient care to be certain that he was delivering the package to the right person, and the bank was held responsible for his negligence. There the teller, in giving out the deposit, was acting in his official capacity, and hence the liability of the bank. The case before us now is different, the bonds being stolen by the teller, who absconded. This teller was both clerk and teller; but the taking of the bonds was not an act pertaining to his business, as either clerk or teller. The bonds were left at the risk of the plaintiff, and never entered into the business of the bank. Being a bailment merely for safe keeping, for the benefit of the bailor, and without compensation, it is evident the dishonest act of the teller was in no way connected with his employment. Under these circumstances, the only ground of liability must arise in a knowledge of the bank that the teller was an unfit person to be appointed, or to be retained in its employment. So long as the bank was ignorant of the dishonesty of the teller, and trusted him with its own funds, confiding in his character for integrity, it would be a harsh rule that would hold it liable for an act not in the course of the business of the bank, or of the employment of the officer. There was no undertaking to the bailor that the officers would not steal. Of course there was a confidence that they would not, but not a promise that they should not. The case does not rest on a warranty or undertaking, but of gross negligence in care taking. Nothing short of a knowledge of the true character of the teller, or of reasonable grounds to suspect his integrity, followed by a neglect to remove him, can be said to be gross negligence, without raising a contract for care higher than a gratuitous bailment can create. The question of the bank's knowledge of the character of the teller was fairly submitted to the jury.

But it turned out that after the teller absconded his accounts were found to be false, and that he had been abstracting the funds of the bank for about two years, to an amount of about $26,000.

It was contended that the want of discovery of the state of his accounts for such a length of time, especially as he had charge of the individual ledger, was such evidence of negligence as made the bank liable.

The court negatived this position, and held that the bank was not bound to search his accounts for the benefit of a gratuitous bailor, whose loss arose not from the account as kept by him, but from a larceny, a transaction outside of his employment.

We perceive no error in this. The negligence constituting the ground of liability must be such as enters into the cause of loss. But the false entries in the books, and the want of their discovery, was not the cause of the bailor's loss, and not connected with it. True the same person was guilty of both offences, but the acts were unconnected and independent.

True the bank did not discover in time the injury he did to it; but the very fact that it did not discover his false entries and his peculations repels the knowledge of his dishonesty. The neglect was culpable, and might have led to responsibility to those with whom they had dealings, if they suffered from that neglect. But this neglect to examine into his accounts was not the cause of the bailor's loss. His loss was owing to the immediate act of dishonesty of the teller, and not to his purloining the funds or falsifying the accounts of the bank. The argument of the plaintiff simply results in this, — that mistaken confidence is a ground of liability. But if this were the case, business would stand still; for without a common degree of confidence in agents and officers, much of the business of the world must cease. The facts were fairly left to the jury, with the proper instructions.

Another complaint is, that the teller was suffered to remain in employment after it was known that he had dealt once or twice in stock. Undoubtedly the purchase or sale of stocks is not *ipso facto* the evidence of dishonesty; but as the judge well said, had he been found at the gaming table, or engaged in some fraudulent or dishonest practice, he should not be continued in a place of trust. So if the president of the bank, when he called on the brokers who acted for the teller in the purchase of stock, has discovered that he was engaged in stock gambling, or in buying and selling beyond his evident means, a different course would have been called for. No officer in a bank, engaged in stock gambling, can be safely trusted; and the evidence of this is found in the numerous defaulters, whose speculations have been discovered to be directly traceable to this species of gambling. A cashier, treasurer, or other officer, having the custody of funds, thinks he sees a desirable speculation, and takes the funds of his institution, hoping to return them instantly, but he fails in his venture, or success tempts him on, and he ventures again to retrieve his loss or increase his gain, and again and again he ventures. Thus the first step, often taken without a criminal intent, is the fatal step which ends in ruin to himself and to those whose confidence he has betrayed. Hence, any evidence of stock gambling, or dangerous outside operations, should be visited with immediate dismissal. In this case, the operations of the teller in stocks, as a gambler in them, was unknown to the officers of the bank until after he had absconded. Upon the whole, the case appears to have been properly tried, and finding no error in the record, the judgment is affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

[TO APPEAR IN 109 MASS.]

NEGLIGENCE. — VIOLATION OF STATUTE. — PROXIMATE AND REMOTE DAMAGE.

METALLIC COMPRESSION CASTING COMPANY v. *FITCHBURG RAILROAD COMPANY.*

In order to obtain the only available supply of water to throw upon a building on fire, it was necessary to lay a hose across a railroad. The water was applied from the hose to the fire, and had diminished and would probably have extinguished it, but servants of the railroad corporation ran a train over the hose, and severed it, and thereby cut off the water from the fire, which then consumed the building. They had notice about the hose, and might have stopped the train to permit the hose to be uncoupled. The railroad was crossed by another at grade a few hundred feet before the place where the hose was severed; and the train was not stopped before the crossing, as required by the Gen. Sts. c. 63, § 93. Held, in an action brought by the owner of the building against the railroad corporation, (1) *that the violation of the statute did not affect the defendants' liability;* (2) *that the firemen had a right at common law to lay the hose across the railroad;* (3) *that it was immaterial that they were volunteers from another town;* (4) *that it was immaterial that the plaintiff did not own the hose;* (5) *that the severing of the hose was the proximate cause of the destruction of the building; and* (6) *that the defendants were liable for the negligence of their servants in severing the hose.*

TORT against a railroad corporation for negligently severing a hose which was laid across their track in Somerville, and thereby cutting off the supply of water from a fire which was consuming the plaintiffs' factory, and causing the destruction of the building and its contents. Trial in this court, before Ames J., who with the consent of the parties withdrew the case from the jury and reported it to this court, to stand again for trial if the plaintiffs could maintain the action on the evidence reported, otherwise the defendants to have judgment. The substance of the evidence is stated in the opinion.

R. H. Dana, Jr., for the plaintiffs, cited *Atkinson* v. *Newcastle & Gateshead Waterworks Co.* Law Rep. 6 Exch. 404; *Hart* v. *Western Railroad Co.* 13 Met. 99; *Safford* v. *Boston & Maine Railroad*, 103 Mass. 583; *Smith* v. *London & Southwestern Railway Co.* Law Rep. 6 C. P. 14; *Davis* v. *Garrett*, 6 Bing. 716; *Dickinson* v. *Boyle*, 17 Pick. 78; *Baltimore & Ohio Railroad Co.* v. *Thompson*, 10 Maryl. 76; *Willey* v. *Fredericks*, 10 Gray, 357; *Scott* v. *Shepherd*, 2 W. Bl. 892; *Vandenburgh* v. *Truax*, 4 Denio, 464; *Powell* v. *Salisbury*, 2 Y. & J. 391; *Gilbertson* v. *Richardson*, 5 C. B. 502; *Lynch* v. *Nurdin*, 1 Q. B. 29; *Borradaile* v. *Brunton*, 8 Taunt. 535; *Lee* v. *Riley*, 18 C. B. (N. S.) 722; *The George & Richard*, Law Rep. 3 Adm. & Eccl. 467; *Bailiffs of Romney Marsh* v. *Trinity House*, Law Rep. 5 Exch. 204; *Byrne* v. *Wilson*, 15 Irish Law, 332; *White* v. *Moseley*, 8 Pick. 356; *Saxton* v. *Bacon*, 31 Verm. 540; *Scott* v. *Hunter*, 46 Penn. State, 192; *Rylands* v. *Fletcher*, Law Rep. 3 H. L. 330; *Jones* v. *Festiniog Railway Co.* Law Rep. 3 Q. B. 733.

T. H. Sweetser & N. St. J. Green (*W. S. Stearns* with them), for the defendants, cited St. 1855, c. 452, § 1; Gen. Sts. c. 63, §§ 93, 94; c. 24, §§ 7, 26; Sedgwick on Damages, (5th ed.) 82, and cases cited; Sourdat, Traité de la Responsabilité, §§ 42, 44, 105, 106; *Mott* v. *Hudson River Railroad Co.* 1 Robertson, 585; *Bailiffs of Romney Marsh* v. *Trinity House*, Law Rep. 5 Exch. 204; *Ryan* v. *New York Central Railroad Co.* 35 N. Y. 210; *Denny* v. *New York Central Railroad Co.* 13 Gray, 481; *Marble* v. *Worcester*, 4 Gray, 395; *Connecticut Insurance Co.* v. *New York & New Haven Railroad Co.* 25 Conn. 265; *Anthony* v. *Slaid*, 11 Met. 290; *Silver* v. *Frazier*, 3 Allen, 382; *Williams* v. *Adams*, Ib. 171, *Hutchins* v. *Hutchins*, 7 Hill, 104; *New York Academy of Music* v. *Hackett*, 2 Hilton, 219; *Crain* v. *Petrie*, 6 Hill, 522; *Lamb* v. *Stone*, 11 Pick. 527; *Brown* v. *Cummings*, 7 Allen, 507; *Waite* v. *Gilbert*, 10 Cush. 177; *Parsons* v. *Pettingell*, 11 Allen, 507.

CHAPMAN, C. J. The case is reserved upon the evidence offered by the plaintiffs. That evidence would authorize the jury to find substantially as follows: —

On the 24th of January 1870, a little before midnight, the plaintiffs' manufacturing establishment was discovered to be on fire. The buildings were situated in Somerville, about fifty feet south of the track of the Fitchburg Railroad. Two fire engines were soon brought upon the ground, belonging to the Somerville fire department, and one from Cambridge. Not being able to procure a supply of water otherwise, they laid the hose across the track, under the direction of the chief engineer of the Cambridge fire department, and obtained a supply from a hydrant on the north side of the track. The water was, by means of the hose, applied to the fire, and had diminished it, and would probably have extinguished it in a short time but for the acts of the defendants. At that time a freight train came along from the west, and though its managers had sufficient notice and warning, and might have stopped, and had no occasion for haste, they paid no attention to the hose, but carelessly passed over it with their train, and thereby severed it, and stopped the water. They injured the hose so much that it could not be seasonably repaired; and thereby the plaintiffs' buildings and machinery were consumed. They did not delay to give time for uncoupling the hose, which would have delayed them but a few minutes.

One of the grounds taken by the plaintiffs is, that the defendants' train did not stop before crossing the Grand Junction Railroad, and thereby violated the Gen. Sts. c. 63, § 93, which require that trains shall be stopped before crossing another railroad at grade. The point of this crossing was in sight of the fire, and a few hundred feet west of it. But the object of the statute was solely to prevent the collision of trains at crossings, and had no reference to the extinguishment of fires. It is not applicable to this case.

The plaintiffs further contend, that the hose was properly and rightfully laid across the track, for the purpose of aiding in the extinguishment of the fire. This the defendants deny, because they had obtained a legal title to the land occupied by their railroad. It cannot be denied that it was their property, and they had the same right to its possession that other landowners have to their lands, so far as this case is concerned. But all

rights of property are subject to some limitations. No one has a right to his real estate, which is absolutely exclusive. In Cooley on Constitutional Limitations, 594, it is said that police regulations may authorize one to take, use, and destroy the private property of individuals, to prevent the spread of fire, the ravages of pestilence, the advance of a hostile army, or any other public calamity. See also the authorities there cited. But we have no occasion to consider the principle further than it is settled by this court in *Taylor* v. *Plymouth*, 8 Met. 462. It is there held that the right to take private property to prevent the spread of fire exists by the common law. Chief Justice Shaw discusses the principle, and cites the authorities. We cannot doubt the soundness of the principle; and it authorized the parties engaged in extinguishing the fire in the plaintiffs' factory to lay their hose across the defendants' track.

The elaborate provisions which our statutes have made for the extinguishment of fires indicate the magnitude of the interest which the community has in preventing the spread of conflagrations; but these statutes do not supersede the common law. Their purpose is merely to enable the community to protect themselves more effectually than they could do otherwise. Thus the organization of a fire department with officers and implements does not deprive the people of a neigborhood from obtaining an engine and hose, and crossing the neighboring lands to obtain water for stopping a conflagration, without waiting for an organization; and individuals may climb upon neighboring roofs to carry buckets of water. It is a sufficient justification, that the circumstances made such an invasion of private property reasonable and proper, in helping to extinguish the fire.

The objection of the defendants, that the officers of the fire department in Cambridge had no jurisdiction in Somerville, and could not act officially in that town has no validity. They had a fire company organized, and an engine and hose, and were in the vicinity of the building, and they could not with propriety stand idly by, and witness the spread of a fire which they might extinguish, merely because it was beyond the town line. They had a right, as citizens, to do what they reasonably could to prevent this public calamity, whether in their own city or a neighboring town.

It is urged that upon this principle one person may enter upon the property of another for the purpose of extinguishing a fire in a small building of no importance, and where there is no danger to other buildings. Undoubtedly the principle is to have a reasonable limitation. He who enters upon the property of another takes upon himself the burden of establishing the fact that there was a just occasion for it; and in this case the plaintiffs must submit to the jury, with proper instructions, the question whether there was good cause for laying the hose across the defendants' track. All that the court can say is, that there is sufficient evidence to submit to the jury.

But assuming that the hose was properly laid across the track, yet the defendants contend that the plaintiffs have no cause of action, because the hose was not their property, nor were the men who had possession of it their servants. It is true that the hose was not their property, and the men in charge of it were not their servants. Their services were voluntary, and if they had gone away and taken the hose and engine with them, the plaintiffs would have had no legal claim against them. But we do not

think that these circumstances are material. The men and the engine were in fact furnishing water to the plaintiffs, and were thereby extinguishing the fire. They were rendering the same services to the plaintiffs as if they were hired and were using the plaintiffs' hose. The defendants cut off the supply of water, and this was as really an interference with the plaintiffs' possession as if they held the possession under a deed, and as if the men were laboring under a contract. The interference was tortious.

It is further contended, that no direct or immediate injury was occasioned to the plaintiffs by the act of the defendants, but that the injury was occasioned by the fire directly, and by the defendants remotely. The question of proximate cause is often involved in difficulty, by reason of the endless variety of circumstances in which injuries may occur; and the cases on the subject are very numerous. A case which much resembles the present is *Atkinson* v. *Newcastle & Gateshead Waterworks Co.* Law Rep. 6 Exch. 404. The defendants were a company incorporated to erect waterworks and supply water to the inhabitants, with the obligation to keep a certain head upon the fire plugs. They neglected to do this, and were thereby subject to a penalty. The plaintiffs' saw-mill and lumber-yard took fire; and in consequence of the defendants' neglect in respect to the head of water, the plaintiffs could not obtain a supply, and their property was burned. It was held that the defendants were liable, on the common law principle stated in Com. Dig. Action on the Case, A: "Whenever a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages." The defendants contended that the damages were too remote, but the court held otherwise. Kelly, C. B., significantly asked, "What kind of damage can be more a promixate consequence of the want of water than the destruction by fire of a house which a proper supply of water would have saved?" Baron Bramwell remarked that it was the immediate consequence of the proximate cause. *Couch* v. *Steel*, 3 El. & Bl. 402, was cited as decisive of this principle. Among other cases illustrating the subject of direct consequences are *Scott* v. *Shepherd*, 2 W. Bl. 892; *Gilbertson* v. *Richardson*, 5 C. B. 502; *Lee* v. *Riley*, 18 C. B. (N. S.) 722; *Dickinson* v. *Boyle*, 17 Pick. 78; *Wellington* v. *Downer Kerosene Oil Co.* 104 Mass. 64.

Other cases are cited where the damages were held to be too remote, but they are unlike the present case. The law regards practical distinctions, rather than those which are merely theoretical; and practically, when a man cuts off the hose through which firemen are throwing a stream upon a burning building, and thereupon the building is consumed for want of water to extinguish it, his act is to be regarded as the direct and efficient cause of the injury.

It is further contended that the advantage to be gained by the plaintiffs from the supply of water through the hose was merely prospective, and thus was remote. But it was not prospective, in the sense in which that word is used in the cases cited by the defendants. In respect to the extinguishment of the fire, the advantage was immediate.

It is further contended that the railroad company owed no duty to the plaintiffs in a case like this. It may be true that the company owed the plaintiffs no active duty; but it cannot be doubted that they owed the negative duty of forbearing to do an unlawful act which caused an injury.

And the defendants are responsible for the act of their agents who had the control of the train. This principle is too well settled to require discussion. *Case to stand for trial.*

SUPREME COURT OF PENNSYLVANIA.

[FEBRUARY 9, 1874.]

PROMISSORY NOTE. — EXTENSION OF TIME TO MAKER. — DISCHARGE OF INDORSER.

HAGER v. *HILL.*

The holder of a promissory note executed a written instrument by which he agreed with the maker to extend the time of payment, which written instrument contained the following clause: "Provided further, that no delay of demand shall interfere with any claim I may have upon the indorsers of said note." Held, on a suit against the indorser upon the note, that his liability was not discharged by such agreement.

ERROR to the district court of Philadelphia.

Opinion of the court by MERCUR, J.

This suit was against the indorser of a promissory note. The first assignment of error raises the question as to whether he was discharged by reason of an agreement between the holder and the maker, after the note became due, extending the time of payment. It is a well recognized rule, that an extension of time by a valid agreement between the creditor and the principal will, as a general rule, discharge the indorser. The reasons therefor are these: The liability of the indorser to the holder is secondary and contingent. On his paying the note, he has a right of action against the principal, or of subrogation to the rights of the creditor. Hence, if time has been given, or an act has been done by the creditor which prejudices these equities in the indorser, he will be discharged.

It has, however, been repeatedly held in England, and in this country, that a discharge by the creditor of the principal debtor will not discharge the surety, if there be an agreement between the creditor and the principal that the surety shall not be thereby discharged. Byles on Bills, 316; *Ex parte Glendinning*, 1 Buck B. C. 517; *Ex parte Carstairs*, Ib. 560; *Gifford, ex parte*, 6 Vesey Jr. 805; *Boultbee* v. *Stubbs*, 18 Vesey Jr. 20; *Nichols et al.* v. *Norris*, 3 Barn. & Ad. 41 (28 E. C. L. R. 28); *Kearsley* v. *Cole*, 16 Mee. & Wels. 128; *Boaler et al.* v. *Mayor et al.* 115 Eng. Com. Law Rep. 76 (19 C. B. N. S. 76). It was said, however, by Lord Chancellor Eldon, in *Ex parte Glendinning, supra:* "Ever since Mr. Richard Buck's case, the law has been clearly settled, and is now perfectly understood, that unless the creditor reserves his remedies, he discharges the surety by compounding with the principal, and the reservation must be upon the face of the instrument by which the parties make

the compromise; for evidence cannot be admitted to vary or explain the effect of the instrument." It was held in *Wyke* v. *Rogers*, 1 De G., Mac. & G. 408, that parol evidence might be given to show that an agreement, which would by itself operate to release the surety, was not to have that effect.

The ground upon which an agreement to give time to the maker, made by the holder without the consent of the indorsers upon a valid consideration, is held to be a discharge of the indorsers, is solely this, that the holder thereby impliedly stipulates not to pursue the indorsers, or to seek satisfaction from them in the intermediate period. It can never apply to any case where a contrary stipulation exists between the parties. Hence, if the agreement for delay expressly saves and reserves the rights of the holder in the intermediate time against the indorsers, it will not discharge the latter. In such case the very ground of the objection is removed, that their rights are postponed against the maker, in case they should take up the note. Story on Prom. Notes, § 415. The same rule is recognized in *Viele* v. *Hoag*, 24 Vt. 46; *Morse* v. *Huntington*, 40 Vt. 488; *Clagett et al.* v. *Salmon*, 5 Gill & Johns. 315. The whole course of Chancellor Walworth's reasoning in *Bangs* v. *Strong*, 10 Paige's Chan. Rep. 11, leads to the same result.

The indorser was not a party to the contract between the holder and the maker. He was not thereby precluded from paying the note at any moment. Having paid it he would have had an immediate right of action against the maker. None of his rights were in the slightest degree impaired.

Neither the search of counsel or our own examination has resulted in finding that the precise point has ever been decided by this court. When not in conflict with our own precedents, it is desirable that we conform to what seems to be the general rule of the commercial world. The case of *Manufacturers' Bank* v. *Bank of Pennsylvania*, 7 W. & S. 335, has been cited in opposition to this rule. Such is not the case. The point there decided is merely that an indorser may be discharged by the holder giving time to the maker, after judgment has been obtained against him; that the creditor must no more impair the rights of the indorser, after he has obtained judgment against the maker, than before.

The written instrument executed by the plaintiff below, by which he agreed with the maker to extend the time of payment, expressly declares: *Provided further*, That no delay of demand shall interfere with any claim I may have upon the indorsers of said note." The case is thus clearly brought within the rule, and we hold that the extension of time to the maker in a manner which preserved all the rights of the indorser, did not discharge the latter.

The second and third assignment have no merit. The acceptance of the conveyance of land in the absence of the plaintiff below, by acting without authority, and so known by the defendant below, and repudiated by the holder of the note, cannot prejudice his rights against the indorser.

The learned judge was correct in instructing the jury to find in favor of the plaintiff below. *Judgment affirmed.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

[TO APPEAR IN 109 MASS.]

CONSTITUTIONAL LAW. — PARDON. — CONVICTION.

COMMONWEALTH v. *LOCKWOOD.*

By the constitution of the Commonwealth, the governor with the advice of the council may grant a pardon of an offence after a verdict of guilty, and before sentence and while exceptions allowed by the judge who presided at the trial are pending in this court for argument; and the convict, upon waiving his exceptions and pleading the pardon, is entitled to be discharged.

INDICTMENT for cheating by false pretences; returned at March term 1871 of the superior court in Suffolk for criminal business. At May term of that court a trial was had, a verdict of guilty returned, and exceptions taken by the defendant to the rulings and decisions of the presiding judge were allowed.

The exceptions were duly entered in this court, and while they were pending here, and before any argument or decision of the questions arising thereon, the defendant on December 13, 1871, came into the superior court, and there pleaded a pardon, granted by the governor with the advice of the council on December 8, of the offence charged in the indictment. The district attorney, in behalf of the Commonwealth, replied that the pardon was granted "while the exceptions were pending and undecided as aforesaid, and before any judgment on said verdict was or had been rendered by said superior criminal court or any conviction had on said indictment, and was and is null and void." The defendant demurred to the replication; and Lord, J., reported the case for the determination of this court as follows: —

"By consent of the parties, I report for the determination of the supreme judicial court, whether said pardon can be pleaded in bar of sentence upon said indictment; and whether it can or cannot be pleaded, what is the legal effect of the pleading in the case. It was agreed between the parties, that the exceptions to the rulings and decisions of the superior court were pending at the time the pardon was issued; and that said exceptions were subsequently waived, and the pardon pleaded, as appears by the record. The Commonwealth's attorney contended that, under the constitution of the Commonwealth, the governor cannot pardon till conviction is established by the judgment of the court upon a verdict of guilty; that at all events, even if the executive may interpose his pardon before sentence, it can only be when nothing of judicial proceeding remains except sentence, when the right of the government to move for sentence is judicially determined; and that under no circumstances whatever can a pardon be issued while there remains undecided a judicial question, upon which conviction and sentence depend. On the part of the defendant, it was contended that the power and right of the governor to pardon is absolute upon the rendition of a verdict of guilty by the jury, and, whether so or otherwise, the defendant is entitled upon the pleadings to be discharged."

G. A. Somerby & W. S. Gardner (*T. H. Sweetser* with them), for the defendant.

J. W. May, district attorney, for the Commonwealth.

GRAY, J. This case presents an interesting question of the extent of the power conferred by that provision of the constitution of the Commonwealth, which declares that "the power of pardoning offences, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council; but no charter of pardon, granted by the governor, with advice of the council, before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offence or offences intended to be pardoned." Const. Mass. c. 2, § 1, art. 8.

The nature of this question, involving a definition of the limits of the constitutional authority of the executive department of the government, and the doubts which some of us at first entertained in relation to it, justify, if they do not require, a full statement of the reasons and precedents for the conclusion at which upon mature consideration we have unanimously arrived.

The ordinary legal meaning of "conviction," when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while "judgment" or "sentence" is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained. The authorities upon this point are so numerous, that it will be sufficient to cite a few of those which show that such was the legal understanding and use of these words at the time of the adoption of our constitution.

Upon a question of the meaning of legal language as used at that time, there is no higher authority than Blackstone's Commentaries, which were published in 1765, and of which Edmund Burke, in his Speech on Conciliation with the Colonies, in 1775, said that he had heard that nearly as many copies had been sold in America as in England.

Blackstone uniformly speaks of the verdict of a jury upon a plea of not guilty as constituting the "conviction," even while the case is still open to a motion for a new trial or in arrest of judgment. After discussing the granting of a new trial when the accused has been found guilty by the jury, and the conclusive effect of an acquittal, he adds: "But if the jury find him guilty, he is then said to be *convicted* of the crime whereof he stands indicted. Which conviction may accrue two ways: either by his confessing the offence and pleading guilty; or by his being found so by the verdict of his country." 4 Bl. Com. 362. "After trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance; of which the principal is the benefit of clergy." Ib. 365. "We are now to consider the next stage of criminal prosecution, after trial and conviction are past, in such crimes and misdemeanors as are either too high or too low to be included within the benefit of clergy; which is that of *judgment*." "Whenever he appears in person, upon either a capital or inferior conviction, he may at this pe-

riod, as well as at his arraignment, offer any exception to the indictment, in arrest or stay of judgment." Ib. 375. After describing the effect of "sentence of death, the most terrible and highest judgment in the laws of England," as attainting the criminal, and incapacitating him to be a witness, or to perform the functions of another man, he observes: "This is after *judgment;* for there is great difference between a man *convicted* and *attainted;* though they are frequently through inaccuracy confounded together. After conviction only, a man is liable to none of these disabilities; for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment; the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed; he may obtain a pardon or be allowed the benefit of clergy." Ib. 380, 381. "When judgment, pronounced upon conviction, is falsified or reversed, all former proceedings are absolutely set aside." Ib. 393. "General words have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony, but the conviction or attainder must be particularly mentioned." Ib. 400. "A pardon may either be pleaded upon arraignment, or in arrest of judgment, or in bar of execution." Ib. 402. The terms of our constitution clearly indicate that its framers had in mind these rules of the common law.

The word "conviction" was used in the same sense in many public acts of the government of this State, after it had thrown off the authority of the crown, and before the adoption of the constitution of the Commonwealth. By St. 1776, c. 32, § 18, it was provided that "no miswriting, misspelling, false or improper English, after conviction" upon an indictment for treason, should "be any cause to stay or arrest judgment thereupon." By St. 1776, c. 44, § 1, any person offending against the act of 1775, c. 9, to prevent the forgery of bills of public credit, "and being thereof convicted as in said act provided, shall be adjudged guilty of felony and suffer the pains of death." By St. 1776, c. 48, § 3, any person transported out of the State as a public enemy, and returning during the war without license of the general court, should, "on conviction thereof before the superior court of judicature," "be adjudged guilty of felony, without benefit of clergy." And by the St. of January 25, 1779, c. 3, any inhabitant of this State, committing treason without the limits thereof, might be tried therefor in the county whereof he was an inhabitant, and, "if thereof convicted in the same county, be adjudged and punished in the same manner as if the said offence had been therein committed." Mass. State Laws, 1775–1780, pp. 110, 127, 136, 211. The death warrants of the same period, issued by the council exercising the executive power, preserve the same distinction between conviction by the jury and judgment of the court. For example, the warrant for the execution of Bathsheba Spooner and others, for the murder of her husband in Worcester in 1778, recites that the defendants "were by verdict of our said county of Worcester convict, and thereupon" "were by our justices of our said court adjudged to suffer the pains of death." 2 Chandler's Criminal Trials, 378.

The first crimes act of the United States begins with these words: "If any person or persons, owing allegiance to the United States of America,

shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death." U. S. St. 1790, c. 35, § 1. Section 31 of the same act declares that "the benefit of clergy shall not be used or allowed upon conviction of any crime for which, by any statute of the United States, the punishment is or shall be declared to be death." And our own St. of 1784, c. 56, § 2, provided that "if any person shall be convicted of any crime wherein by law the plea of benefit of clergy was heretofore allowed, and for which, without such benefit of clergy, he must have been adjudged to suffer the pains of death," he should be otherwise punished as therein prescribed. See also Sts. 1782, c. 9, § 1; c. 14, § 3; 1784, c. 9, § 4; cc. 46, 52, 58; c. 67, § 11; c. 68.

Mr. Dane, who was admitted to the bar before the adoption of the constitution, and was peculiarly learned in the law of his time, says: "A man is convict by verdict, but not attainted before judgment." Pardon is another special plea in bar." "By pleading a pardon in arrest of judgment, there is an advantage, as it stops the corruption of blood, by preventing the attainder." "Conviction is on confession or verdict." 6 Dane Ab. 534, 536. See also 7 Dane Ab. 339, 340.

In *Commonwealth* v. *Richards*, 17 Pick. 295, it was held that an appeal allowed by statute from the court of common pleas in a criminal case, to be claimed at "the court before which such conviction shall be had," must be claimed before the end of the term at which the verdict was returned; and Chief Justice Shaw, in delivering the opinion of the court, said: "It has generally been considered, we believe, that, as the sentence is the final act in a criminal proceeding, it constitutes the judgment, and it is only from final judgments that appeals are to be taken. But though such is the general rule of law, we think it has been changed by this statute, and that the statute itself has made a distinction between a conviction and a judgment. In general, the legal meaning of 'conviction' is, that legal proceeding of record, which ascertains the guilt of the party, and upon which the sentence or judgment is founded, as a verdict, a plea of guilty, an outlawry, and the like." See also *Commonwealth* v. *Andrews*, 2 Mass. 409, and 3 Mass. 126, 131, 133.

The use of words in our modern statutes is not the highest evidence of their meaning at the time of the adoption of the constitution. But it may be observed that the Rev. Sts. c. 123, § 3, and the Gen. Sts. c. 158, § 5, provide that "no person indicted for an offence shall be convicted thereof, unless by confession of his guilt in open court, or by admitting the truth of the charge against him by his plea or demurrer, or by the verdict of a jury accepted and recorded by the court." It is by the defendant's own confession, plea, or demurrer, by the verdict, that he is here declared to be "convicted," without any action of the court in either alternative, except, in the latter, the mere formal acceptance and recording of the verdict, which implies no adjudication of the court upon the defendant's guilt. See also Rev. Sts. c. 137, § 11, and Gen. Sts. c. 172, § 16; Rev. Sts. c. 139, and Gen. Sts. c. 174, *passim*.

When indeed the word "conviction" is used to describe the effect of the guilt of the accused as judicially proved in one case, when pleaded or given in evidence in another, it is sometimes used in a more comprehensive sense, including the judgment of the court upon the verdict or confession of guilt; as, for instance, in speaking of the plea of *autrefois convict*, or of the effect of guilt, judicially ascertained, as a disqualification of the convict. And it might be held to have the same meaning in the somewhat analogous case in which the constitution provides that "no person shall ever be admitted to hold a seat in the legislature or any office of trust or importance under the government of this Commonwealth, who shall in the due course of law have been convicted of bribery or corruption in obtaining an election or appointment." Const. Mass. c. 6, art. 2. See *Case of Falmouth*, Mass. Election Cases (ed. 1853), 203.

But Blackstone says: "The plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment." 4 Bl. Com. 336. And it is still an open question in this Commonwealth, whether a verdict of guilty, rendered upon a good indictment, and which has not been set aside, will or will not, before judgment, support a plea of *autrefois convict*. 6 Dane Ab. 533. *Commonwealth* v. *Roby*, 12 Pick. 496, 510; *Commonwealth* v. *Lahy*, 8 Gray, 459, 461; *Commonwealth* v. *Harris*, Ib. 470, 473.

At the time of the adoption of the constitution, the word "conviction" was ordinarily used to express the verdict only, even in treating of the disqualification of the convict as a witness. Lord Mansfield, for example, in 1774, where a witness was objected to as incompetent because he stood convicted of perjury, the record of which conviction was produced, said: "A conviction upon a charge of perjury is not sufficient, unless followed by a judgment; I know of no instance in which a conviction alone has been an objection." *Lee* v. *Gansel*, Cowp. 1, 3. In the earlier cases in this Commonwealth, the word "conviction" was used in the same sense as applied to such a question, even before it had been settled whether a judgment was necessary to complete the disqualification of the witness. Upon the trial in this court in 1788 of an indictment against two for perjury, to which one pleaded guilty and was offered as a witness for the Commonwealth against the other, Mr. Justice (afterwards Chief Justice) Dana states, in his manuscript note of the case, "To whom it is objected that, standing convict of the *crimen falsi*, he is disqualified to be a witness. It is answered that conviction, though of the *crimen falsi*, is no disqualification, without it be followed by an infamous punishment; or at least until after judgment." The witness was excluded by a divided court. *Commonwealth* v. *Manley & Willis*, Bristol, October term, 1788. So in *Cushman* v. *Loker*, 2 Mass. 106, the court said, "It is now settled that nothing short of a conviction on an indictment for *crimen falsi*, and a judgment on the conviction," "is a sufficient objection to the competency of a witness." And in the latest case on that subject, in which it was held that a verdict, without judgment, was not such a "conviction" as could be proved under Gen. Sts. c. 131, § 13, in order to affect the credit of a witness, it was said: "In its most common use, it signifies the

finding of the jury that the prisoner is guilty." *Commonwealth* v. *Gorham*, 99 Mass. 420.

It was argued by the learned attorney for the Commonwealth, that the words of the constitution, that no pardon granted before conviction "shall avail the party pleading the same," imply that it cannot be taken advantage of after verdict in the first prosecution for the offence in question, because the time for pleading is then past. But "pleading," as here used, may well include any suitable form of bringing the pardon to the notice of the court, by plea, motion, or otherwise. Coke, Holt, Mansfield, and Blackstone, all speak of "pleading" a pardon after the verdict and even after the judgment. 3 Inst. 235. *Rex* v. *Parsons*, 1 Freem. 501; *The King* v. *Beaton*, 1 W. Bl. 479; 4 Bl. Com. 337, 376, 402. In at least one instance before the superior court of judicature of the Province of Massachusetts Bay, a man who had been indicted for murder and found guilty by the jury, and his case continued from term to term, upon a motion for a new trial, until he had obtained a pardon from the king, was then, as the record states, "brought again into court, and, being set to the bar, upon his knees he pleads his majesty's most gracious pardon of the offence aforesaid, a certificate of which from the secretary of state's office, being produced, is allowed." *The King* v. *Richardson*, Rec. 1772, fol. 15. And, as we shall presently see, there are many similar records since the adoption of the constitution.

It is not easy to ascertain the source of the constitutional restriction of the pardoning power. The acts of the English Parliament contained no like provision; and the histories of Massachusetts, and such imperfect notes of the debates in the convention which framed the constitution of the Commonwealth as have come down to us, are silent upon the subject.

The English Bill of Rights of 1688 declared "that all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void." St. 1 W. & M. sess. 2, c. 2, § 12. That article did not affect the power of the sovereign to remit fines and forfeitures and pardon offenders; but was aimed at the illegal practice of granting away fines and forfeitures before they had actually accrued; and an inquest or inquisition of office by the jury was a complete conviction within the contemplation of the bill of rights. 3 Bl. Com. 259; 4 Bl. Com. 301. By the common law, a conviction of felony by verdict or confession vested in the king the goods and chattels of the felon, although his lands were not forforfeited until attainder by judgment. 4 Bl. Com. 373,* 387.

The house of commons in 1679, and again in 1689, resolved that a royal pardon could not be "pleaded in bar of an impeachment." 4 Hatsell's Prec. 192, 193, 277. And in 1700 the act of settlement of 12 & 13 W. III. c. 2, § 3, declared "that no pardon under the great seal of England be pleadable to an impeachment by the commons in parliament." "But," Blackstone says, "after the impeachment has been solemnly heard and determined, it is not understood that the king's royal grace is further restrained or abridged." 4 Bl. Com. 399. There is no doubt that the king can pardon after sentence upon an impeachment. 7 Parl. Hist. 283; 4 Hatsell's Prec. 296 note; 2 Hallam's Const. Hist. c. 12 (7th ed.), 414. And the question of his power to pardon after a vote of guilty and before sentence does not appear to have arisen in England. But in proceedings

upon impeachment before the house of lords since the St. of W. III. the plea or vote of guilty was considered the "conviction," and the sentence passed thereon the "judgment," as clearly appears in two cases of impeachment for high treason in the reign of George I., in which Lord Chancellor Cowper presided as lord high steward. In one of them, in 1715, the Earl of Derwentwater and five other lords having confessed the charge, Lord Cowper said: "You have severally pleaded guilty, and are thereby convicted. What say you" (addressing each of them by name separately) "why judgment should not pass upon you according to law?" 15 Howell's State Trials, 761, 791. In the other, in 1716, the Earl of Wintoun pleaded not guilty; upon the trial the lords unanimously voted that he was guilty, and Lord Cowper announced to him that they had found him guilty, and asked him if he had anything to offer why judgment of death should not pass upon him according to law. He then moved in arrest of judgment, and after argument of counsel upon that motion the lords retired, and on their return Lord Cowper, in passing sentence of death, addressed him as follows: "George, Earl of Wintoun, I have already acquainted you that your peers have found you guilty, that is, in the terms of the law, convicted you of the high treason whereof you stand impeached. After your lordship has moved in arrest of judgment, and the lords have disallowed that motion, their next step is to proceed to judgment." Ib. 805, 874, 893. In 1747, Lord Hardwicke, presiding at the trial of Lord Lovat on a like impeachment, used similar words. 18 Ib. 529, 827.

The federal Constitution, like that of this Commonwealth, wholly excepts cases of impeachment out of the executive power of pardon. Const. U. S. art. 2, § 2; 3 Madison's Debates, 1433. But both constitutions, and the highest authorities upon the subject, recognize the like distinction between "conviction" and "judgment" in cases of impeachment, as in cases tried before a court and jury. The constitution of Massachusetts provides that the senate shall hear and determine all impeachments; that "their judgment" shall not extend further than to removal from office and disqualification to hold or enjoy any place of honor, trust, or profit under this Commonwealth; "but the party so convicted shall be nevertheless liable to indictment, trial, judgment, and punishment according to the laws of the land." Const. Mass. c. 1, § 2, art. 8. The Constitution of the United States provides that all impeachments shall be tried by the senate; that "no person shall be convicted without the concurrence of two thirds of the members present;" and that "judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law." Const. U. S. art. 1, § 3. Mr. Justice Story, in his Commentaries on the Constitution, says: "In England, the judgment upon impeachments is not confined to mere removal from office; but extends to the whole punishment attached by law to the offence. The house of lords, therefore, upon a conviction, may, by its sentence, inflict capital punishment; or perpetual banishment; or forfeiture of goods and lands; or fine and ransom; or imprisonment; as well as removal from office, and incapacity to hold office; according to the nature and aggravation of the offence." And again, in speaking of

the more complete restriction of the president's power of pardon, in cases of impeachment, than of the king's, he says: "As the judgment upon a conviction extends no farther than to a removal from office, and disqualification to hold office, there is not the same reason for its exercise after the conviction, as there is in England." Story on Const. U. S. §§ 782, 1502. In the trial of President Johnson, the rules of the court of impeachment provided that "if the impeachment shall not, by any of the articles presented, be sustained by the vote of two thirds of the members present, a judgment of acquittal shall be entered; but if the person accused shall be convicted upon any of said articles by the votes of two thirds of the members present, the senate shall proceed to pronounce judgment." And accordingly, after the vote had been taken, and declared by the chief justice, showing that two thirds of the members present had not found the president guilty, and that he was therefore acquitted, the chief justice said, "That is not the judgment of the senate;" and, after debate, a judgment of acquittal was unanimously ordered to be entered. 1 Johnson's Trial, 14; 2 Ib. 497, 498.

But the effect of the provision of the constitution of Massachusetts, as applicable to ordinary criminal cases, is not now to be determined for the first time by the meaning of its words, or by any analogy to be drawn from cases of impeachment in England or America. It is practically settled by the action of the highest executive and judicial authorities of the Commonwealth, reaching back to the time of the adoption of the constitution, and proved by the records of the governor and council and of this court.

At November term, 1780, in Essex, Sargent Daniels was tried and found guilty of manslaughter, and, upon motion of his counsel, the court ordered that sentence be respited, and that he be bailed, and the case was continued until November term, 1871, "for judgment; and now the said Sargent Daniels, being again brought into court and set at the bar, is asked by the court if he has anything to say why sentence of death should not be given against him, pleads the gracious pardon of his excellency John Hancock, Esquire, with the advice of council, of the offence aforesaid, under the public seal of the Commonwealth of Massachusetts, bearing test the fifth day of November, A. D. 1781, which being produced and read in court, is allowed. It is therefore considered by the court, that the said Sargent Daniels go without day." Rec. 1781, fol. 128. The charter of pardon in that case, a copy of which has been laid before us, recites that the defendant, "an infant," had been "convicted of manslaughter: Whereupon the said court suspended the sentence against the said Sargent by reason of his being of very tender years."

At April term, 1787, in Hampshire, Timothy Hinds was indicted for treason against the Commonwealth, and pleaded guilty, and the indictment was continued until September term, 1787, for sentence. "And now the said Timothy is set to the bar, and it being demanded of him what he hath to say wherefore sentence of death should not be passed upon him for the crime of treason of which he stands convicted, says that since the time of his conviction of the crime alleged in said indictment, to wit, on the eleventh day of May in the year of our Lord seventeen hundred and eighty-seven, his excellency James Bowdoin, Esquire, then gov-

ernor of the Commonwealth, by and with the advice of the council of said Commonwealth, granted to him, the said Timothy, under the seal of the Commonwealth, a full, free, and complete pardon of the crimes in said indictment alleged, and of all pains and penalties therefor, which same charter of pardon the said Timothy here produces and exhibits to the court, and prays that the same may be allowed, which is in the words following:" [setting it out in full] "all which being seen and fully understood, it seems to the court here that the plea of the said Timothy as above in pleading alleged, and the pardon by him now produced, are good and sufficient in law. It is therefore considered by the court that the said Timothy go without day." Rec. 1787, fol. 241.

The judges present when these cases were decided appear by the records to have been Chief Justice Cushing and Justices Sargent and David Sewall in both cases, together with Justice Sullivan in the first case, and Justice Sumner in the second. All these judges, as well as Governor Hancock and Governor Bowdoin, had been members of the convention which framed the constitution of the Commonwealth.

A report of another case is preserved among the manuscripts of Chief Justice Dana. At November term, 1803, in Suffolk, Deborah Stevens was indicted for the murder of her bastard child by drowning. At the trial, before Justices Strong, Sedgwick, and Thacher, there was evidence that the child had been alive a short time before it was thrown into the water, and was there found dead the next day, with a bruise upon its head and a string tied about its neck. It was argued by the counsel for the prisoner, that the death of the child might have been caused either by the blow on the head, or by being strangled by the string about its neck, before being thrown into the water; and so not by drowning. Justices Strong and Sedgwick (Thacher, J., dissenting) instructed the jury, "that if they were convinced a murder had in fact been committed by the prisoner upon the child, and only doubted as to the means of the death, they might lawfully convict the prisoner, unless from the evidence they were satisfied that it was dead before it was thrown into the water by the prisoner." The defendant being found guilty by the jury, a motion was made in her behalf "for a suspension of judgment in order to obtain a request from the court to the supreme executive to issue a charter of pardon in her favor." The result of this motion is stated by the chief justice in these words: "The court, after argument by the attorney general and the counsel for the prisoner, suspended sentence against the prisoner, and recommended her to the governor as a subject of mercy. Three of the court, viz., Dana, Sewall, and Thacher, were of this opinion on account of the direction in matter of law of Sedgwick and Strong to the jury, the two justices who sat on the trial together with Thacher — Strong and Sedgwick adhering to their direction as given to the jury."

At April term, 1808, in Worcester, David Potter was indicted for larceny, and pleaded guilty, and the indictment was continued for sentence. At September term following, held by Chief Justice Parsons and Justices Samuel Sewall and Isaac Parker (successively chief justices of this court), the defendant, being set to the bar, pleaded "that sentence on the conviction aforesaid ought not to be passed upon him," because, "after the conviction aforesaid," the governor, with the advice of the council,

had granted to him a charter of pardon, which he produced and prayed might be allowed by the court. "All which being seen and understood by the court here, it is considered by the court that the said David Potter be discharged and go without day." Worcester Rec. 1808, fol. 540.

About the same time, John Waite, having been indicted for forgery in the county of Cumberland, now in Maine, but then part of this Commonwealth, and found guilty, moved the court, as the report states, "to set aside the verdict on the ground that he was improperly convicted." The grounds of the motion were, that the defendant had since obtained evidence of confessions of the principal witness against him, which showed him to have been incompetent; and that, if he was competent, the defendant now had evidence further to discredit him. Chief Justice Parsons, in delivering the opinion of the court upon this motion, said: "In the trial of offences, but a small part of the trial is intrusted to the judges. The offender's peers are to pass on him; and to set aside a verdict merely at our discretion, and not on grounds which the law considers as sufficient, would be an arbitrary interference in judicial proceedings, and a violation of the important rights of jurors." "If there are any equitable or humane causes for relief, they belong not to us, but to the executive. Sentence must be passed on the verdict." To which the reporter adds, in a note, "The sentence being respited, the defendant received a pardon from the governor and council, which, being produced at the next term of the court, was allowed, and the defendant discharged, *ut audivi*." *Commonwealth* v. *Waite*, 5 Mass. 261. A certificate of that pardon, from the office of the secretary of the Commonwealth, was produced at the argument of the present case.

At April term, 1807, in Middlesex, Joel Brown was tried before Sedgwick, J., and found guilty of larceny, and moved for a new trial for misdirection of the judge to the jury. The case was continued to November term, 1809, when, after argument upon this motion, Sedgwick, J., said, "The conviction, I think, was right," and the other judges concurring, a new trial was refused. *Commonwealth* v. *Brown*, 4 Mass. 580. Before any further judgment or sentence, the defendant obtained and pleaded a pardon from the executive, and was thereupon discharged by the court. Middlesex Rec. 1810, fol. 6.

The published reports afford other instances in which, after overruling motions for a new trial and in arrest of judgment, or exceptions taken by the defendant at the trial, the court has suspended final judgment and sentence to await the effect of an application of the defendant to the governor for a pardon. *Commonwealth* v. *Ladd*, 15 Mass. 526; *Commonwealth* v. *Mash*, 7 Met. 472, 475.

Even when no judgment whatever has been rendered, and no action had by the court after the acceptance and recording of the verdict, no instance has been found in which a pardon granted after verdict has been disputed or disallowed. And our records show that in very many cases, upon the production of a pardon granted by the executive at that stage, the court has discharged the defendant. It will be sufficient to add one more case to those already cited.

At September term, 1811, in Worcester, held by Parsons, C. J., Sedgwick, Sewall, and Parker, JJ., Frederick Carpenter, who had been in-

dicted for uttering as true a forged and counterfeit paper, and pleaded not guilty, and been found guilty by the jury, and afterwards, being set to the bar, pleaded "that no judgment ought to be rendered on the said verdict," because the governor and council had since granted him a pardon, "wherefore he prays that judgment on said verdict may be arrested, and he may be thereof discharged and permitted to go without day. Which being seen and fully understood by the court, it is thereupon ordered that the said Frederick Carpenter be discharged and go thereof without day." Worcester Rec. 1811, fol. 409.

In *Commonwealth* v. *Green*, 17 Mass. 515, in 1822, in which the power of the court to grant a new trial in a capital case, on motion of the defendant after conviction by the jury, was deliberately settled for the first time in this Commonwealth, upon full argument and advisement, Chief Justice Parker, in delivering judgment, clearly affirmed the authority of the court, upon being satisfied of an error in the rulings at the trial, to certify the fact to the executive and recommend a pardon, instead of granting a new trial; and declared that the latter course was the most proper, not from any doubt of the power of the executive to grant a pardon at that stage of the case, but because it was more consistent with public justice that the defendant should be tried again according to law than that he should be discharged for some irregularity perhaps not affecting the merits of the case, and more consistent with the rights of the defendant to have the judges correct an error committed by themselves or by others concerned in the trial, "instead of being obliged to rely upon the disposition of the court to recommend a pardon, or of the executive power to grant it." 17 Mass. 535, 536.

If the words of the constitutional provision could be deemed ambiguous, their interpretation must be held to be settled by the contemporaneous construction and the long course of practice in accordance therewith. *Stuart* v. *Laird*, 1 Cranch, 299, 309; *Edwards* v. *Darby*, 12 Wheat. 206, 210; *Commonwealth* v. *Parker*, 2 Pick. 550, 556.

It was argued for the Commonwealth that the defendant could not be said to be convicted at the time when this pardon was granted, because a bill of exceptions was then pending in this court to the rulings under which he had been found guilty, and that after pleading the pardon he might still prosecute his exceptions, and, if they should be sustained, have the verdict set aside. But it is within the election of the defendant whether he will avail himself of a pardon from the executive (be the pardon absolute or conditional); if he does not plead the pardon at the first opportunity, he waives all benefit of the pardon; if he does so plead it, he waives all other grounds of defence. Staunf. P. C. 150; J. Kel. 25; 4 Bl. Com. 402; *United States* v. *Wilson*, 7 Pet. 150. The pleading of the pardon in the superior court would therefore be *ipso facto* a waiver of his exceptions. A still more conclusive answer to this objection is, that at the time of the adoption of the constitution, and for many years afterwards, no bill of exceptions was permitted by law. It was first given to the rulings of a justice of this court by St. 1804, c. 105, § 5; and to the rulings of the court of common pleas, by St. 1820, c. 79, § 5. The providing by the legislature of a new form of presenting questions of law to the court does not make the verdict of a jury, so long as it stands, less

than a "conviction," and cannot abridge the prerogative of the executive under the constitution. *Ex parte Garland*, 4 Wallace, 333, 380.

The necessary conclusion is, that, having regard to the ordinary legal meaning of the words used in the constitution at the time of its adoption, to the presumption which the judiciary is always bound to make in favor of the validity of the acts of those intrusted with the highest authority in another department of the government, to the rule of interpretation in favor of the liberty of the subject, and to the practical construction given to this clause by the supreme executive of the Commonwealth and by our predecessors in this court from the beginning, the pardon of the defendant is valid, and he must be *Discharged.*

SUPREME COURT OF THE UNITED STATES.

[JANUARY, 1874.]

BILL IN EQUITY TO SET ASIDE SALE. — RIGHT OF INHABITANTS OF STATES IN REBELLION.

WASHINGTON UNIVERSITY v. *FINCH et al.*

The fact that a debtor was a resident of a state in rebellion, and prevented by act of Congress and the war from paying a debt due to a creditor in a loyal state, is no ground for setting aside a sale made by virtue of a power in a trust deed given to secure the payment of such debt.
Former adjudications of this court reviewed.

APPEAL from the circuit court of the United States for the districts of Missouri.

Opinion of the court by

Mr. Justice MILLER. James J. Daly and Edward R. Chambers purchased of W. G. Elliott, in March, 1860, certain real estate in St. Louis, Mo. For the principal part of their purchase money they gave him their promissory notes, and to secure the payment of these notes, they made a deed of trust to Seth A. Ranlett, conveying the property thus purchased with authority to sell it in satisfaction of these notes, if they were not paid as they fell due.

The notes were assigned by Elliott to the appellant, the Washington University, and the money being unpaid and due, the real estate so conveyed was sold by Ranlett, in accordance with the terms of the trust deed, to the university, on the 9th day of December, 1872. The trustee made the university, which was a corporate body, a deed for the land, and the university afterwards sold it for value, to one Kimball.

Daly and Chambers were both citizens of the State of Virginia, residing in the county of Mecklenberg, when they bought the land of Elliott, and have resided there ever since. Chambers and Finch, assignees of Daly, who had been declared a bankrupt, filed the bill, on which the pres-

ent decree is founded, on the chancery side of the circuit court of the United States for the District of Missouri, to have the sale decreed void, and to have the proceeds of the sale of the land of the university to Kimball declared a trust fund for their use; and the court decreed accordingly.

The sole ground of this relief is, that the sale by the trustees took place during the late civil war, and that Daly and Chambers were citizens of the State of Virginia, resident within that part of the State declared by the President to be in a state of insurrection.

The argument is, that, inasmuch as all commercial intercourse was forbidden between the people of the Loyal States and those residing in the insurrectionary districts, both by virtue of the act of Congress and by the principles applicable to nations in a state of war, all processes for the collection of debts were suspended, and that the complainants being forbidden by these principals to pay the debt, there could be no valid sale of the land for such payment.

The case before us was not one of a sale by judicial proceeding. No aid of a court was needed or called for. It was purely the case of the execution of power by a person in whom a trust had been reposed in regard to real estate, the land, the trustee, and the *cestui que trust* all being, as they had always been, within a state whose citizens were loyally supporting the nation in its struggle with its enemies. The conveyance by complainants to Ranlett vested in him the legal title of the land, unless there was a statute of the State of Missouri providing otherwise; and if there was such a statute, it still gave him full control over the title, for the purposes of the trust which he had assumed. No further act on the part of the complainant was necessary to transfer the title and full ownership of the property to a purchaser under a sale of the trustee.

The debt was due and unpaid. The obligation which the trustee had assumed on a condition had become absolute by the presence of that condition. If the complainants had both been dead, the sale would not have been void for that reason, if made after the nine months during which a statute of Missouri suspends the right to sell in such cases. If they had been in Japan, it would have been no legal reason for delay. The power under which the sale was made was irrevocable. The creditor had both a legal and a moral right to have the power, made for his benefit, executed. The enforced absence of the complainants, if it be conceded that it was enforced, does not, in our judgment, afford a sufficient reason for arresting his agent and the agent of the creditor in performing a duty which both of them imposed upon him before the war began. His power over the subject was perfect; the right of the holder of the note to have him exercise that power was perfect. Its exercise required no intercourse, commercial or otherwise, with the complainants. No military transaction would be interfered with by the sale. The enemy, instead of being strengthened, would have been weakened by the process. The interest of complainants in the land might have been liable to confiscation by the government; yet we are told that this right of the creditor could not be enforced, nor the power of the trustee lawfully exercised. No authority in this country, or any other, is shown us for this proposition. It rests upon inference from the general doctrine of absolute non-intercourse be-

tween citizens of states which are in a state of public war with each other, but no case has been cited of this kind even in such a war.

It is said that the power to sell in the deed of trust required a notice of the sale in a newspaper; that this notice was intended to apprise the complainants of the time and place of sale, and that, inasmuch as it was impossible for such notice to reach complainants, no sale could be made. If this reasoning were sound, the grantors in such a deed need only go to a place where the newspaper could never reach him, to delay the sale indefinitely, or defeat it altogether. But the notice is not for the benefit of the grantor in the sense of notice to him. It is only for his benefit by giving notoriety and publicity of the time, the terms, and the place of sale, and the property to be sold, that bidders may be invited, competition encouraged, and a fair price obtained for the property. As to the grantor, he is presumed to know that he is in default, and his property liable to sale at any time, and no notice to him is required.

But the authority of certain cases decided in this court is relied on, in which the effect of the late civil war is considered in judicial proceedings between parties residing on different sides of what has been called the line separating the belligerents.

The first of these is that of *Hanger* v. *Abbott*. The case laid down the proposition that when a citizen of a state, adhering during that war to the national cause, brought suit afterwards against a citizen residing, during the war, within the limits of an insurrectionary state, the period during which the plaintiff was prevented from suing by the state of hostilities should be deducted from the time necessary to bar the action under the statute of limitations. It decided nothing more than this. It did not even decide that a similar rule was applicable in a suit brought by the latter against the former; and it decided nothing in the question now before us, even if the sale here had been under a judicial proceeding. 6 Wall. 532.

Another case is that of *Dean* v. *Nelson*, 10 Wallace, 158. If the present had been a sale under judicial order, that case would have some analogy to this, and some expressions more general than was intended may, as this court has already said, tend to mislead. That case was a proceeding within an insurrectionary district, but held by our military forces, in a court established by military orders alone. It was a proceeding to foreclose a mortgage on personal property, and it was instituted against parties who had been expelled by military force from their residence, and who were forbidden absolutely by the order which expelled them, and which was addressed to them by name, from coming back again within the lines of the military authority which organized the court. Inasmuch as, without their consent, and against their will, they were thus driven from their houses, and forbidden to return, by the arbitrary though probably necessary act of the military power, we held that a judicial decree by which their property was sold during the continuance in force of this order was void as to them. To that doctrine we adhere, and have repeated it at this term in the case of *Lasere* v. *Rochereau*.

But this court has never decided, nor intentionally given expression to the idea that the property of citizens of the Rebel States, located in the Loyal States, was, by the mere existence of the war, exempted from judi-

cial process for debts due to citizens of the Loyal States, contracted before the war. A proposition like this, which gives an immunity to rebels against the government, not accorded to the soldier who is fighting for that government in the very locality where the other resides, must receive the gravest consideration, and be supported by unquestioned weight of authority, before it receives our assent. Its tendency is to make the very debts which the citizens of one section may owe to another an inducement to revolution and insurrection; and it rewards the man who lifts his hand against his government by protection to his property, which it would not otherwise possess, if he can raise his efforts to the dignity of a civil war.

The case of *McVeigh* v. *The United States*, 11 Wallace, 259, holds that an alien enemy may be sued, though he may not have the right to bring suits in our courts, and that when he is sued he has a right to appear and defend himself. "Whatever," says the court, "may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence."

And this proposition is supported by the authorities there cited, as well as by sound reason. If such be the rule in regard to alien enemies in a war between independent states, it should be quite as applicable, if not more so, between citizens of the same government, who are only enemies in a qualified sense in a civil war. See, also, *Masterson* v. *Howard*, of the present term. [See report of this case below.]

We are of the opinion that the sale by the trustee, in the case under consideration, was a lawful and valid sale, and that complainant's bill should have been dismissed. The decree of the circuit court is, therefore, reversed, with directions to dismiss the bill.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1873.]

EFFECT OF WAR UPON THE POWER OF THE COURTS OF A STATE IN REBELLION.

MASTERSON, Assignee, &c. v. *HOWARD et al.*

The existence of war closes the courts of each belligerent to the citizens of the other, but does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property, in their own courts, against the citizens of the other, whenever the latter can be reached by process.

APPEAL from the circuit court of the United States for the Western District of Texas.

Opinion of the court by

FIELD, J. It is unnecessary to determine whether the decree against Maverick, entered in January, 1861, is to be deemed final or interlocutory.

The subsequent decree against Herndon, entered in June, 1866, is in form against both of the defendants. The court below, in its subsequent proceedings, treated the latter as the one which finally determined the rights of the parties in the case, and from that decree the appeal is taken. The default of both Maverick and Herndon, in not answering the supplemental bill, was entered, and an order taking the bill as confessed against them was made as early as October, 1860. This order was, in January, 1861, confirmed by the court, and made final as to the defendant Maverick, but was set aside on terms as to the defendant Herndon; and leave was granted him to file his answer until the rule day in March following. The answer having been filed by him without complying, as contended, with the terms prescribed, his default was entered and an order made taking the supplemental bill as confessed against him. In June, 1866, his answer was by the court struck from the files, and the order taking the supplemental bill as confessed was confirmed and made final. The joint decree, which is the subject of the appeal, was entered against both of the defendants.

It is unnecessary to inquire whether the court erred in striking Herndon's answer from the files, as his assignee makes no objection to the ruling, or the decree which followed. He has consented through his counsel to the dismissal of his appeal. The question, therefore, for our consideration upon the record is, whether the allegations of the supplemental bill, and of the original bill to which it refers, are sufficient to support the decree thus entered upon the default of the defendants. And upon this question there can be no doubt.

The suit was brought on the equity side of the court to quiet the title of the complainant to a tract of land situated in the State of Texas, and to prevent harassing and vexatious litigation from a multiplicity of suits. The original bill alleges, in substance, that the complainant is in possession and seised in fee of the tract, deriving his title from a grant issued by the government of Spain, in 1766, to Indians of the Mission of San José, in Texas; that the defendants have made locations and surveys of large parcels of the tract under certificates or warrants issued by the Republic of Texas, by virtue of which they assert a right to the parcels thus located and surveyed, and have thereby created a cloud upon the title of the complainant, and disturbed his possession. The bill prays that the surveys and locations, and patents thereon, if any have been obtained, may be determined and declared void, and the cloud impending over the title of the complainant be thereby removed; or that the right of the complainant being established, he may be quieted in his title and possession, and all obstruction to the peaceable enjoyment of his property be removed; or that he may have such other or further relief as the nature of the case may require. The original complainant having died, a supplemental bill, in the nature of a bill of revivor, was filed and prosecuted in the name of his heirs. It shows a change of parties consequent upon the death of the original complainant, and the death of several of the original defendants; and brings in as new parties the heirs of one McMullin, through whom the complainant traced his title. But so far as it concerns the defendants, Maverick and Herndon, who are alone represented by the appellants, its allegations are substantially the same as those of the original bill.

The decree of the court entered on the 20th of June, 1866, responded substantially to these allegations. It adjudged the title of the complainants to the tract in question "to be free from all clouds cast thereon" by the defendants, Maverick and Herndon, and all persons claiming under them, and that "all patents, locations, and surveys obtained or owned" by them, in conflict with the title of the complainants, which was decreed to be a good title, were null and void, and directed the defendants to cancel and remove them. The clause of the decree directing that the complainants have and recover the land of the defendants may be supported under the general prayer of the bill, if, pending the suit, the defendants had gone into possession of any of the parcels located and surveyed by them, and, if such were not the case, the clause could not in any way prejudice their rights.

But the counsel of the appellant, Maverick, looking outside of the record to the condition of the country at the time the decree was rendered, takes the position that the decree is null and void, because rendered by the court before the proclamation of the President of August 20th, 1866, announcing the close of the war in Texas, contending that, as the complainants were citizens of California and Illinois, and the defendants citizens of Texas, it was a decree in a suit between public enemies, and, therefore, void.

If it were true, which is not admitted, that the parties to the present suit were to be regarded as public enemies after the cessation of hostilities in Texas, and the restoration of the authority of the United States, under the proclamation of the President, issued in August, 1866, the conclusion drawn by counsel would not follow. The existence of war does, indeed, close the courts of each belligerent to the citizen of the other, but it does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property in their own courts against the citizens of the other, whenever the latter can be reached by process. The citizens of California and Illinois had a right to seek the courts of the United States in Texas, or to proceed with suits commenced therein previous to the war, to protect their property there situated from seizure, invasion, or disturbance by citizens of that State, so soon as those courts were opened, whether official proclamation were made or not of the cessation of hostilities.

In the case of *The Protector*, 12 Wallace, 700, it was held that the war began in the Gulf States at the date of the proclamation of intended blockade of their port by the President. That was the first public act of the executive in which the existence of the war was officially recognized, and to its date the courts look to ascertain the commencement of the war. And, so far as the operation of the statutes of limitation in the several states is concerned, to determine the period which must be deducted for the pendency of the war from the limitation prescribed, it was held in the same case that the war continued until proclamation was in like manner officially made of its close. This is the extent of the decisions of this court. *Brown* v. *Hiatts*, 15 Wall. 184; *Adger* v. *Alston*, Ib. 560.

It is well known that before such official proclamation was made, courts of the United States were held in the several states which had been engaged in the rebellion, and their jurisdiction to hear and determine the cases brought in them, as well before as after such proclamation, is not open to controversy. *Judgment affirmed.*

SUPREME COURT OF THE UNITED STATES.

[JANUARY, 1874.]

NATIONAL BANKING ASSOCIATIONS. — RATE OF INTEREST.

TIFFANY v. *NATIONAL BANK OF MISSOURI.*

1. *The thirtieth section of the act of Congress of June 3, 1864, relative to national banking associations, allows such banks the rate of interest allowed by the state in which they are situated, to natural persons generally, and a higher rate, if state banks of issue are authorized to charge a higher rate.*
2. *The defendants, a national banking association, being allowed to take nine per cent. interest, under authority of the act of Congress, are not liable for any penalty.*

IN error to the circuit court of the United States for the districts of Missouri.

Opinion of the court by

STRONG, J. In an action like the present, brought to recover that which is substantially a statutory penalty, the statute must receive a strict, that is, a literal construction. The defendant is not to be subjected to a penalty unless the words of the statute plainly impose it. The question therefore is, whether the thirtieth section of the act of Congress of June 3, 1864, relative to national banking associations, clearly prohibits such associations in the State of Missouri from reserving and taking a greater rate of interest than eight per cent., the rate limited by the laws of that State to be charged by the banks of issue organized under its laws. It is only in case a greater rate of interest has been paid than the national banking associations are allowed to receive, that they are made liable to pay twice the interest. The act of Congress enacts that every such association "may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more; except that where, by the laws of any state, a different rate is limited for banks of its issue, organized under state laws, the rate so limited shall be allowed for associations organized in any such state under the act." What, then, were the rates of interest allowed in Missouri when the loans were made by the defendants, that are claimed to have been usurious? It is admitted to have been ten per cent. per annum, allowed to all persons, except banks of issue organized under the laws of the State, and they were allowed to charge and receive only eight per cent.

The claim of the plaintiff is, that the general provision of the act of Congress that national banking associations may charge and receive interest at the rate allowed by the laws of the state where they are located, has no application to the case of these defendants, and that they are restricted to the rate allowed to banks of issue of the State, that is, to eight per cent. This, we think, cannot be maintained. The act of Congress is

an enabling statute, not a restraining one, except so far as it fixes a *maximum* rate in all cases where state banks of issue are not allowed a greater. There are three provisions in section thirty, each of them enabling. If no rate of interest is defined by state laws, seven per cent. is allowed to be charged. If there is a rate of interest fixed by state laws for lenders generally, the banks are allowed to charge that rate, but no more, except that if state banks of issue are allowed to reserve more, the same privilege is allowed to national banking associations. Such, we think, is the fair construction of the act of Congress, entirely consistent with its words and with its spirit. It speaks of allowances to national banks and limitations upon state banks, but it does not declare that the rate limited to state banks shall be the *maximum* rate allowed to national banks. There can be no question that if the banks of issue of Missouri were allowed to demand interest at a higher rate than ten per cent., national banks might do likewise. And this would be for the reason that they would then come within the exception made by the statute; that is, the exception from the operation of the restrictive words "no more" than the general rate of interest allowed by law. But if it was intended they should in no case charge a higher rate of interest than state banks of issue, even though the general rule was greater, if the intention was to restrict rather than to enable, the obvious mode of expressing such an intention was to add the words "and no more," as they were added to the preceding clause of the section. The absence of those words, or words equivalent, is significant. Coupled with the general spirit of the act, and of all the legislation respecting national banks, it is controlling. It cannot be doubted, in view of the purpose of Congress in providing for the organization of national banking associations, that it was intended to give them a firm footing in the different states where they might be located. It was expected they would come into competition with state banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this, they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar state institutions. This was considered indispensable to protect them against possible unfriendly state legislation. Obviously, if state statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, national banking associations could not compete with them, unless allowed the same. On the other hand, if such associations were restricted to the rates allowed by the statutes of the State to banks which might be authorized by the state laws, unfriendly legislation might make their existence in the State impossible. A rate of interest might be prescribed so low that banking could not be carried on, except at a certain loss. The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow to national associations the rate allowed by the State to natural persons generally, and a higher rate, if state banks of issue were authorized to charge a higher rate. This construction accords with the purpose of Congress, and carries it out. It accords with the spirit of all the legislation of Congress. National banks have been national favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the general

government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the states, or to ruinous competition with state banks. On the contrary, much has been done to insure their taking the place of state banks. The latter have been substantially taxed out of existence. A duty has been imposed upon their issues so large as to manifest a purpose to compel a withdrawal of all such issues from circulation. In harmony with this policy is the construction we think should be given to the thirtieth section of the act of Congress we have been considering. It gives advantages to national banks over their state competitors. It allows such banks to charge such interest as state banks may charge, and more, if by the laws of the State more may be charged by natural persons.

The result of this is that the defendants, in receiving nine per cent. interest upon the loans made by them, have not transgressed the act of Congress, and consequently they are under no liability to the plaintiff.

The judgment is affirmed.

CIRCUIT COURT OF THE U. S. — SOUTHERN DISTRICT OF MISSISSIPPI.

[NOVEMBER TERM, 1873.]

LIFE INSURANCE. — REPRESENTATIONS OF AGENT. — TENDER OF OVERDUE PREMIUM.

SARAH L. MOREY v. *NEW YORK LIFE INS. CO.*

1. *Where the local agent of a life insurance company, on receiving payment of the first premium due on a policy, represented to the assured that the company was in the habit of giving thirty days' notice to its policy holders of the time when each premium falls due, and promised that he would give such notice, and the assured died two days after the second premium fell due, no such notice having been given to him, and the proof failed to show that the agent had any authority to make such an agreement, it was held that the beneficiary could not recover on the policy.*
2. *Where the company's receipt for the premium was not received by the local agent to whom it was to be paid, until two days after the death of the insured, it was held, under the circumstances above stated, that the beneficiary could not recover on the policy; otherwise if the premium had been tendered before it fell due.*
3. *Where by express agreement, or by the course of business between the parties, it is understood that payment will be made to the local agent, and no notice has been given in sufficient time that payment shall be made at the office and principal place of business stipulated in the contract, a tender of payment to the local agent, whether received by him or not, will excuse the policy holder and prevent a forfeiture.*

THE facts are stated in the opinion.

HILL, J. This action at law was brought in the circuit court of Madison County, and removed into this court, to recover the amount of a policy

of insurance issued by the defendant on the first day of April, 1871, for the sum of five thousand dollars, payable to plaintiff upon the death of her late husband, John B. Morey, upon the payment of $197.90 then made, and the same amount to be paid thereafter on the first day of April of each year during the continuance of said policy, with the usual condition annexed, that if said premium should not be paid on or before the first day of April of each year, the policy should become void, and all payments theretofore made become forfeited to defendant.

The plea is that the policy became void under this stipulation by reason of the non-payment of the premium due on the first day of April, 1872; to which the plaintiff replies: First, that when said John B. Morey made application for said policy it was to one Morey, a local agent of defendant, doing business for defendant in the city of Canton; that at the time he stated to said agent that he feared he would forget the time when the premiums would become payable and fail to make them in proper time, and thereby the policy would become forfeited; that the said agent stated, as an inducement to said John B. to take said policy, that the company was in the habit of giving thirty days' previous notice of the time, and that he would give the notice and save the forfeiture; and, secondly, that it was understood that payment would be made to the local agent in Canton; that, at the time the premium fell due, the agent at Canton had not been furnished with the printed premium receipts, without which he was not authorized to receive payment; that the failure to give the notice and to furnish the receipt was a waiver of the right to a forfeiture of the policy.

A jury being waived, the questions of both law and fact are submitted to the court.

The only facts shown by the proof, and necessary to be stated for the application of the rules of law, are as follows: —

Morey, the agent of the defendant, did make the statements to John B. Morey, at the time the application for the policy was made, as stated in the pleadings; the advance premium was paid on the delivery of the policy; no notice of the time the premium fell due was given; John B. Morey died on the 3d day of April, two days after the premium fell due, without having paid or tendered the same to any one. On the 5th, payment of the premium was tendered to the agent at Canton, and refused, for the reason that John B. Morey had died on the 3d.

That the premium receipt was not forwarded to the general agents at Vicksburg until the 4th, and not forwarded to the local agent until the next day.

The question upon the pleadings and proof is, did the want of notice of the time of payment, and the absence of the receipt in the hands of the local agent, excuse the payment of the premium upon the day it became due, and thereby avoid the forfeiture stipulated in the contract?

The policy, and the conditions annexed to it, constituted the contract, and must be held binding on both parties to it, unless its conditions have been waived by some act or omission of the party against whom it is sought to be enforced, or by the authorized agent of such party.

The proof fails to show that the agent, Morey, had any authority to engage that notice should be given; indeed, none such is claimed; but it

is claimed that, being the agent, it was a fraud in him to make such a promise, as it misled the assured, and induced him to take the policy which he would not otherwise have done; but it is apparent from the proof that he did not make the promise as agent, or pretend to bind the defendant, but only made it as a friend and relative of John B. Morey; it was a mere personal promise, for the fulfilment of which he could only look to him who made it; Morey, the agent for this purpose, was more the agent for the assured than the insurer; so that upon the facts, this want of notice cannot avail the plaintiff.

The remaining question is, did the failure to place in the hands of the agent at Canton the premium receipt on or before the time of payment, waive and excuse payment on that day? The conditions of the policy require payment at defendant's office in the city of New York, unless a different place is stipulated for in writing between the parties, or to an agent having for delivery a printed receipt, signed by the president of the company, or other officer mentioned.

The advance payment was made to the local agent in Canton upon the delivery of the policy. The fact that the premium receipt for the second payment was forwarded to the local agent in Canton shows that that was the place where payment was expected to be made, and where it doubtless would have been made but for the death of said John B. Such evidently being the understanding between the parties, I am satisfied that had the tender of the amount due been made to the local agent at Canton on the day and within the time stipulated, the forfeiture claim could not have been maintained; but, unfortunately for the plaintiff, this was not done. I cannot accept the position as correct, that nothing can avoid the forfeiture but an agreement of waiver of payment made by the principal officers of the company in New York, or by actual payment or tender of payment there, or to a local or other agent having the premium receipt, signed as provided for. Where, by an express agreement or by the course of business between the parties, it is understood that payment will be made to the local agent, and no notice has been given in sufficient time that payment shall be made at the office and principal place of business stipulated in the contract, a tender of payment to the local agent, whether received by him or not, will excuse the policy holder and prevent the forfeiture. To hold otherwise would open the door to the grossest frauds upon the part of these foreign insurance companies. The company, when its coffers have been in part filled with the hard earnings of the policy holders, could withhold the receipt from him who had been depriving himself and family of the comforts, if not the necessaries of life for years, to provide, as he supposed, something for his helpless family when he shall have been laid in the grave; and when he comes, perhaps, on the last moment in which payment can be made, he is for the first time informed that he must pay in New York, or all he has paid will be forfeited — a thing which it is impossible for him to do, and which would be gross injustice. It is said, and is in proof, that these receipts are furnished to the local agents through the general agency for the state, and if the agents' accounts at the principal office are not satisfactory, the receipts are withheld. The answer to this is, that it is a thing about which the policy holder is not presumed to know anything; it surely cannot be held that

he is responsible, or to be affected by dereliction in duty of the company's agent, over whom he has no sort of control. John B. Morey is not presumed to have known of the absence of the receipt, and its absence could have had no influence upon his unfortunate neglect; and however much it is to be regretted that the widow and orphan shall be deprived of the maintenance and support a kind husband and father intended for them, the rules of law must be applied to the facts, which being done, necessarily results in favor of the defendant. *Judgment for defendant.*

SUPREME COURT OF ILLINOIS.

[JANUARY, 1874.]

MALICIOUS PROSECUTION. — PROBABLE CAUSE. — LEGAL ADVICE.

EUGENE P. PALMER v. *MICHAEL J. RICHARDSON.*

1. *In order for the plaintiff to recover in an action for malicious prosecution, the burden of proof is upon him, to show clearly by a preponderance of evidence that the defendant did not have probable cause to institute the criminal prosecution against him. Good faith on the part of the prosecutor is always a good defence, unless it appear that he closed his eyes to facts around him which would have been sufficient to convince a reasonably cautious man that no crime in fact had been committed by the person about to be prosecuted.*
2. *The fact that the defendant before instituting a prosecution alleged to be malicious and without probable cause, had honestly laid all the facts before counsel and followed his advice, is pregnant evidence to show the existence of probable cause.*

CRAIG, J. This was an action on the case brought by Michael J. Richardson against Eugene P. Palmer, in the circuit court of Cook County, to recover for an alleged malicious prosecution, instituted by the latter against the former. The cause was tried by a jury and a verdict rendered in favor of the plaintiff for $1,000. A motion for a new trial was made and overruled, and judgment entered upon the verdict, from which the defendant appealed to this court.

A reversal of the judgment is asked mainly on the ground that the verdict is contrary to the weight of the evidence.

It seems to be difficult for a jury to comprehend that an innocent person may be arrested for a criminal offence, and, at the same time, the law afford no redress against the person who caused the arrest and prosecution, and yet experience teaches us this is not an uncommon occurrence.

While it is a great hardship that an innocent person should be prosecuted for a criminal offence, yet it is far better for the preservation of peace, order, and the well-being of society, that this should occasionally occur, than that the citizen should be deterred from instituting criminal prosecutions for a violation of the laws of the land.

In order for the plaintiff to recover in this case, the burden of proof was upon him to show clearly, by a preponderance of evidence, that the de-

fendant did not have probable cause to institute the criminal prosecution against him. *Ross et al.* v. *Innis*, 35 Ill. 487. Good faith on the part of the prosecutor is always a good defence, unless it appears that he closes his eyes to facts around him, which are sufficient to convince a reasonably cautious man that no crime in fact had been committed by the person about to be prosecuted.

Probable cause has been defined by this court to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence charged. *Richey* v. *McBean*, 17 Ill. 65; *Jacks* v. *Stimpson*, 13 Ill. 701; *Ross et al.* v. *Innis*, 35 Ill. 505; *Collins et al.* v. *Hayte*, 50 Ill. 353.

The main question for consideration in this case then is, Did the plaintiff, by his proof, tested by the correct rules of law that govern this class of cases, make a case which justified the jury in rendering the verdict they did?

Upon a careful examination of the facts in this case, as shown by the record, we have arrived at the conclusion that the verdict is manifestly contrary to the weight of the evidence, and that the jury did not comprehend the law as applicable to the evidence in the case. The prosecution instituted by the defendant, Palmer, which the jury found to be malicious and without probable cause, so far as it is material to state them, grew out of these facts: About 4 o'clock on the morning of the fire in Chicago, October 9, 1871, the plaintiff and one Carragher, with a horse and wagon, went to the store of Hotchkin, Palmer & Co., which was about to be burned, and loaded their wagon with valuable goods, worth from $1,500 to $2,000, and started to the place of business of plaintiff. As the wagon started, Palmer's attention was called to it by his clerk, and he followed and got upon the wagon; the three men had not proceeded far when a controversy arose between Palmer and Richardson in regard to where the goods should be taken and the amount of compensation Richardson should receive for hauling the goods; angry words were exchanged, and the contest was excited. Palmer finally called upon a man who was passing for assistance. After this, Richardson took the goods to a place of safety where Palmer wanted them taken; the goods were unloaded; Richardson kept back a piece of beaver-cloth as pay for hauling, which he insisted Palmer agreed he should have. Palmer refused to let him have this, and the evidence of Palmer and Carragher shows that Richardson took off this piece of goods by force.

The evidence shows that about the time these goods were loaded in the wagon by Richardson and Carragher, several lots were stolen as they were carried out of the store and piled up; that Palmer was not acquainted with Richardson.

Palmer and his clerk testify that Richardson had no authority to load his wagon with goods. Ludlow, the clerk, swears that he had entire charge of taking care of and saving the goods, and that he gave no authority to Richardson to take or haul goods; that he had no knowledge of Richardson until about the time the wagon started to drive off with the load; he saw it and directed Palmer's attention to the wagon, and as it moved off Palmer got upon it. That plaintiff and Carragher attempted

to haul off this load of goods in defiance of Palmer, is sworn to by Palmer, and he seems to be corroborated by this fact. He testifies that on the road he had difficulty with Richardson and called for assistance, and a man passing by interfered. Richardson and Carragher in their evidence, both testify that Palmer did call for assistance.

There is another very suspicious fact in the case. Palmer testifies that after the goods were unloaded and the two men got in the wagon to start off, he discovered several shawls under the cushion that the men were sitting upon, and that he got in the wagon and forced them off the seat, and got the shawls. Plaintiff and Carragher, in their evidence, concede the fact, but undertake to explain that they did not know the shawls were there.

These are the leading facts in the case, and upon them, some days after Richardson took the piece of beaver-cloth, Palmer had him arrested for stealing it.

When these facts are taken in connection with the further fact that Richardson was an entire stranger to Palmer, and that during this fire larceny was of common occurrence; that excitement ran high, and that law and order were, to a great extent, set at nought, can it be said that Palmer, in causing the arrest of the plaintiff, acted without probable cause and with malice? We do not think the evidence justifies that conclusion. There is another fact in the case that tends to show that Palmer acted in good faith and without malice. Before he commenced the criminal prosecution, he took legal counsel of Mr. Swezey, an attorney-at-law in Chicago, who had been in the habit of doing business for him. Mr. Swezey testifies that Palmer gave him a full statement of the facts in the case; that in stating the facts he gave them as fully and fairly as he did in his evidence on the stand; and that, upon hearing the facts stated, he advised Palmer that there was sufficient ground for the arrest. It is a clear proposition of law, that if Palmer laid all the facts before his attorney with an honest view to learn if they would warrant a criminal prosecution, and was advised they would, such will go far to show probable cause.

In view of all the facts we are satisfied that justice demands that this cause should be submitted to another jury.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

SUPREME COURT OF PENNSYLVANIA.

[JANUARY, 1874.]

CONTRIBUTORY NEGLIGENCE. — CARE REQUIRED ON THE PART OF A CHILD WHO HAS BEEN INJURED.

CRISSY v. *HESTONVILLE, MANTUA, AND FAIRMOUNT PASSENGER RAILWAY COMPANY.*

Where negligence is concurrent, a child will not be held to the exercise of the same degree of care and discretion as an adult.

MERCUR, J. The first assignment of error is not according to the rules. All the other assignments are to the charge of the court, and will be considered together. As a general rule a question of negligence must be submitted to the jury. It should be where there is any substantial doubt as to the facts, or to the inferences to be drawn from them. *Pennsylvania R. R. Co.* v. *Barnett*, 9 P. F. Smith, 259; *Johnson* v. *Bruner*, 11 P. F. Smith, 58.

There is no absolute rule as to what constitutes negligence. It is dependent upon the particular circumstances of the case. Where the measure of duty is not unvarying; where a higher degree of care is demanded under some circumstances than under others; where both the duty and the extent of the performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proven. *McCully* v. *Clarke et al.* 4 Wr. 406; *Pennsylvania Canal Co.* v. *Bently*, 16 P. F. Smith, 30. Where the measure of duty is ordinary and reasonable care, it is always a question for the jury. *Westchester & Philadelphia R. R. Co.* v. *McElwee*, 17 P. F. Smith, 311. Where negligence is concurrent, a child will not be held to the exercise of the same degree of care and discretion as an adult. *Rauch* v. *Lloyd et al.* 7 Casey, 358; *Pennsylvania R. R. Co.* v. *Kelly*, Ib. 372; *Smith* v. *O'Connor*, 12 Wright, 218; *Oakland Railway Co.* v. *Fielding*, Ib. 320; *Glassey* v. *H., M. & F. Passenger R. R. Co.* 7 P. F. Smith, 172; *Kay* v. *Pennsylvania R. R. Co.* 15 P. F. Smith, 269.

Now let us apply the law to the facts in this case. The plaintiff was a child of the age of thirteen years. He and his companion, a boy of the same age, signalled the driver, as the defendant's car crossed Thirteenth Street. The car was slackened to receive them; they stood there by the side of the driver all the way out to Forty-first Street and Lancaster Avenue. No objection was made by either the driver or conductor to their riding there; neither of them requested the plaintiff to step inside of the car; the conductor came to him and collected his fare; at Forty-first Street and Lancaster Avenue, the plaintiff said to his companion in a voice sufficiently loud for the driver to hear, "I am going to get off here." The speed of the car was thereupon slackened; the plaintiff took hold of the dasher with one hand, and the iron on the car with the other, and stepped off; the car continued in motion; the plaintiff's foot slipped; he retained his hold to save himself; he was dragged two or three yards, and until

the front wheel ran over his foot, causing the injury of which he complains. There was a crossing in the street where he desired to get off.

In view of the plaintiff's age, we think this evidence should have been submitted to the jury; the jury should have determined whether the plaintiff had been guilty of negligence; he should be held to the exercise of that degree of care and discretion ordinarily to be expected of a child of his age, neither more or less. *Smith* v. *O'Conner*, *supra*. So in regard to the defendant's alleged negligence. The fact that the plaintiff was suffered to stand upon and get off from the front platform, and whether the defendant exercised proper care under all the circumstances, in not sooner stopping the car, should have been submitted to the jury. It is the duty of a railway company to cause its cars to come to a full stop, to permit a passenger to get off. Whether the defendant properly discharged his duty with a due regard to the age of the plaintiff, and of notice of plaintiff's desire to leave the car, should have been left to the jury. We think the learned judge erred in directing that the verdict should be for the defendant. The errors are sustained.

Judgment reversed, and a *venire facias de novo* awarded.

DISTRICT COURT OF THE U. S. — DISTRICT OF CALIFORNIA.

[JANUARY, 1874.]

MARRIED WOMEN MAY BE ADJUDGED BANKRUPT.

IN RE JULIA LYONS.

In a state whose statute law makes a married woman living apart from her husband liable to be sued as if sole, she may be adjudged bankrupt.

W. H. Fifield, for petitioning creditors.

Whiting & Napthaly, for respondent.

HOFFMAN, District Judge. The question raised by the demurrer in this case is, whether the respondent, being a married woman, is liable on a contract to pay rent, and, if she has committed an act of bankruptcy, can be adjudged bankrupt. It appears that the husband of the respondent has long since renounced and abandoned all his marital rights and duties. For twelve years Mrs. Lyons has lived separate and apart from him, supporting herself and her minor children by her own exertions. In the course of her business as keeper of a lodging-house, she has contracted an indebtedness for rent, and being so indebted, and in contemplation of bankruptcy and insolvency, has made, as is alleged, an assignment of her property in fraud of the bankrupt act.

It is urged by the respondent's counsel that the contract of a married woman for the payment of money is void, and that the petitioning creditor has no debt which the court can recognize. On this point numerous authorities are cited; but as they, for the most part, are decisions under the

act of April 17, 1850, and the amended act of May 12, 1862, no examination of them is necessary. The decision of the question before us turns upon the force and effect to be given to the act of March 9, 1870. Laws of 1870, p. 226.

The first three sections of that act are as follows Section 1. "The earnings of the wife shall not be liable for the debts of the husband." Section 2. "The earnings and accumulations of the wife and her minor children living with her, or being in her custody, while the wife is living separate and apart from her husband, shall be the separate property of the wife." Section 3. "The wife, while living separate and apart from her husband, shall have the sole and exclusive control of her separate property, and may sue and be sued without joining her husband, and may avail herself of, and be subject to, all legal process in all actions, including actions concerning her real estate." The fourth section prescribes the mode in which she may convey her real estate.

The object of these enactments is apparent. It was to secure to the wife, when abandoned by her husband, the fruits of her own industry, and to enable her to support herself and her children out of her earnings and accumulations, free from his interference or molestation. For this purpose her earnings and accumulations, which at common law belonged to her husband, are declared her separate property, and her rights in respect of such property are carefully defined. She is to have the sole and exclusive control of it; she may separately sue or be sued, and may avail herself of and be *subject* to *all legal process* in *all actions*. That the principal intention of the legislature was to protect deserted wives in their just rights, and not to impose upon them additional liabilities, is admitted. For this purpose they were placed in the position of *quasi femes sole*, and were granted all the powers necessary to enable them to earn their own livelihood, and to retain and enjoy the fruits of their industry. But to accomplish this object, it was evidently necessary to create new liabilities as well as to confer new rights. The ability to sue for moneys earned by or due to her was clearly indispensable to enable the wife to attain the object contemplated by the law.

Justice and reason, and even her own interests, demanded that she should herself be liable for all debts contracted by her. For without such liability how could she obtain the credits usually necessary in the conduct of any business; and what could be said of the morality of a law which should announce to a woman that for all debts and demands due her she shall have the right to sue and enforce payment, but as to debts due by her she may plead her coverture as a conclusive bar to the action?

The separate property of a married woman has, on general principles of equity, been held liable for debts contracted in respect to it or in and about its management and improvement. The act of 1870 created a new species of separate property in the earnings and accumulations of the wife while separated from her husband.

The equitable principles already adopted by the courts, and usually enforced by statute, required this new species of separate property should be liable for debts incurred in its creation or management, and in the course of the business, the proceeds of which the statute enables the wife exclu-

sively to enjoy. Further discussion, however, is needless, as the language of the act is too explicit to be mistaken. It enacts that the wife separated from the husband "may sue and *be sued*, and that *she* shall be subject to all *legal process in all actions*." This language is obviously inconsistent with any exemption from liability to suit for a just debt on the pretext that, being a married woman, her contracts for the payment of money are void.

The respondent being thus found to have incurred a valid indebtedness and a liability to be sued therefor as if a *feme sole*, she may, if she has committed an act of bankruptcy, be adjudged a bankrupt. Hilliard on Bankruptcy, p. 49; Avery & Hobbs on Bankruptcy, pp. 33–4; *In re Kinkead*, 7 N. B. R. p. 439.

The demurrer is overruled and the respondent allowed ten days to answer the petition.

SUPREME COURT OF PENNSYLVANIA.

[FEBRUARY, 1874.]

NEGLIGENCE A QUESTION OF FACT. — CONTRIBUTORY NEGLIGENCE OF CHILD.

THE PHILADELPHIA AND READING R. R. CO. v. *LONG.*

Whether the engineer of a railroad runs his engine at a proper rate of speed, and keeps a proper lookout, the facts being in dispute, is a question for the jury.

A mother who takes reasonable care, under the circumstances, of an infant child, is not guilty of negligence.

OPINION delivered by

AGNEW, C. J. This case has been argued by the eminent counsel of the railroad company as if the facts were fixed with the certainty of a special verdict. If we assume that the child, Rosanna Long, suddenly appeared upon the track, five or six feet ahead of the locomotive on the left hand side; that the engineer was in his proper place on the right side of the engine cab, looking out constantly, but his vision, for several feet in front of the cow-catcher, was obstructed by the boiler and carriage of the engine; and that the fireman was at his post ringing the bell, and unable to keep a lookout on the left hand side of the engine; we might conclude that the death of the child was an accident not within the power of the engineer to avoid, and that the court might have given a binding instruction to the jury. Then, indeed, the rate of speed would be immaterial, for, upon such a sudden appearance of the child on the track, no rate of speed, no matter how slow, could have saved it. But it was because these facts were not so fixed and certain, that the question of negligence must necessarily go to the jury, to ascertain exactly how they were; and for the same reason the rate of speed became an element properly belonging to the case. Only two witnesses saw the accident happen. One

of them, S. A. Moore, coming out of an alley into Cotton Street, which crosses Cresson Street and the railroad track at right angles, saw the child and the locomotive at the same instant, at the crossing. To him the sight and the accident were simultaneous, so that his testimony gives us no information of the previous position of the child while the train was moving up Cresson from Gay Street to Cotton. The other witness, Benjamin Levering, saw more. He crossed Cresson at Cotton Street; saw the engine coming. Saw it when it left the depot at Gay Street. The child was then on the upper side of the road; after crossing, he himself turned up Cresson Street, and in doing this turned his back upon the child; for he says, "Just as I turned round the child went on the track, and the cow-catcher struck her, the train then going over eight miles an hour." In his cross-examination he says, when he got opposite to the store at the upper corner of Cotton Street, the child was then on the side of Mr. Long's house, and when he got over, the child was between the tracks. Thus it is very evident the testimony of this, the only witness who saw the child before the train reached Cotton Street, left it an open question of fact where the child was, and whether she was not visible to the engineer had he kept a constant lookout while the train was moving up Cresson Street, before it reached Cotton Street, and whether a slower rate of speed would not have enabled the engineer to discover the child, as well as to reverse his engine before it came upon her. Two of the witnesses testify the speed to have been not less than eight miles an hour, and Levering gives as a reason for his belief, that he had lived there all his lifetime, and of course was in the habit of judging of the speed. Thus it is evident that the position of the child while the train was moving up Cresson Street, the lookout of the engineer, the place of the fireman, the rate of speed, and all the circumstances, were matters entering into the question of negligence, taken into connection, also, with the all-important fact that Manayunk is a closely built, populous town, Cresson Street a public thoroughfare, not of great width, where many persons of all ages, sexes, and conditions are constantly passing and repassing, and crossing the tracks of the railroad rightfully. It was, therefore, clearly the province of the jury to ascertain from the evidence the true position of the child while the train was moving up Cresson Street, when and how far the engineer ought to have seen the child in advance of the locomotive, and whether he was keeping a due lookout, and a properly regulated rate of speed, in traversing a populous street. It was in view of this duty of the jury, the instructions of the judge, contained in the first three assignments of error, were apposite and correct. We disagree emphatically to the position taken by the learned counsel of the railroad company that the rate of speed at the time was not material, and that seven or eight miles an hour is a rate of speed compatible with safety in passing through the streets of a populous town. While it is true that trains must be run at a high rate of speed to reach their greatest utility, populous towns and cities must be exceptions, when the speed must be moderated in view of the danger to life, limb, and property. Where the people and the trains have a common right to be, and to have a joint use of the highway, the rights of each must be regarded. These remarks dispose of the first three assignments of error.

There can be no just complaint against that part of the charge recited in the fourth assignment. It does not contradict the answer to the defendant's fourth point. The learned judge affirmed all his points, including the fourth, stating that it is negligence and would prevent a recovery for parents to suffer an infant less than two years and two months old to wander upon a railroad track when trains are constantly passing. In that part of the charge recited in the fourth assignment, the judge said, "That the fact that the child is found in the street affords a strong presumption of negligence on the part of the plaintiffs. You will, therefore, consider whether the mother took *reasonable care* of the child; if she did not, it was negligence." To *suffer* a child to wander on the street has the sense of *permit*. If such permission or sufferance exist it is negligence. This is the assertion of a principle. But whether the mother did suffer the child to wander is a matter of fact, and is the subject of evidence, and this must depend upon the care she took of her child. Such care must be *reasonable* care dependent on the circumstances. This is a fact for the jury. If she did not exercise this care she was negligent. What more than this can be demanded of her? When a railroad runs through a populous city, has the company a right to exact a harder measure, and are we to say, as a matter of law, that the citizens are to be imprisoned in their houses, or their children caged like birds, otherwise it is negligence? Is it negligence for the poor who congregate these crowded streets, unless, even in the summer's heat, they live shut up in the noisome vapors of their closed tenements, without a breath of healthy air? In this the life they must lead or be adjudged to be negligent? This mother gave her child a piece of bread, to satisfy it, closed the kitchen door to keep it in, and went to the next room to scrub the oil cloth on the floor, and before her labor was finished, and in less than five minutes, the mangled body of her little one was brought in and laid before her. We have no reason to believe that her love for her child was less than that of the more favored of her sex, having servants at their beck. Because the child managed to lift the latch and momentarily disappeared, are we to say this was negligence *per se*, and that she *suffered* her child to wander into the street? What sort of justice is that which tells the mother agonizing over her dying child, "*Your* negligence caused this. *You* suffered your child to run into the jaws of death. We cannot perceive any fault in the railroad company. A speed of eight miles an hour along this populous thoroughfare was all right." We can indorse no such cruel doctrine; but we must say, as was said in *Kay* v. *Railroad Company*, the doctrine which imputes negligence to a parent in such a case is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil. 15 P. F. Smith, 276. *The judgment is affirmed.*

SUPREME COURT OF PENNSYLVANIA.

[FEBRUARY, 1874.]

RIGHT OF FISHING. — RIGHT OF NAVIGATION.

COBB v. *BENNETT et al.*

The right of fishing in a river is subordinate to that of navigation, but this does not excuse the master of a vessel from running into and damaging a net of a fisherman, where he could change the course of the vessel without prejudice to the reasonable prosecution of his voyage, and thus avoid the net.

ERROR to the district court of Philadelphia.

Opinion delivered February 24, 1874, by

AGNEW, C. J. We discover no error in the portions of the charge assigned for error. They may all be comprised in the following instruction: "I charge, as a question of law, he (the defendant) was bound to shorten his tack, if he could thereby have avoided the nets, without prejudice to the reasonable prosecution of his voyage." This was said in view of the facts in evidence on part of the plaintiff, that the defendant was notified of the position of the net of the plaintiff; pointed to the light which marked that position, and requested to change his course, so as not to foul it, and that this could be done conveniently. The judge had already said: "But there is another right in the river, that of navigation, which is superior to the right of fishing, and when they interfere, that of fishing must give way to the right of navigation." He had also said: "Those exercising the rights of navigation will not be excused, if they are sufficiently warned, unless they make a reasonable effort to avoid them. Now, surely, it is not error to say that when the mariner is warned of his approach toward the net of the fisherman, he should change the course of his vessel, *if he can do so without prejudice to the reasonable prosecution of his voyage.*" The entire point of the charge is contained in this qualification, and, hence, it was not doing full justice to the charge to omit the qualifying words in the assignment. What would be a reasonable prosecution of the voyage would depend on the attendant circumstances, and upon these a special instruction might have been called for. Without the qualification there would have been error, for we must agree that the mariner is not bound to shorten his tack merely because a net is stretched across his course. A vessel is entitled to take her course in the navigation of the river, and to hold it, without regard to the fisherman's net, provided the master act without wantonness or malice, and do no unnecessary damage. This is an obvious consequence of the superior right of navigation. But this, we think, was the very doctrine of the charge, and the exception contained in the qualification, in view of the facts in evidence. If the mariner, warned of the position of the net, and requested to change his tack may do so "without prejudice to the reasonable prosecution of his voyage," can we say he is exercising his superior right of navigation justly, and in the spirit of the maxim, *Sic utere tuo ut alienum non ludos*, if, in-

different to the inferior right, he recklessly holds on his way, and fouls and injures the fisherman's net? Certainly we cannot say this, for, in effect, it would be to say a fisherman has no rights whatever — that being no right which another may disregard under all circumstances. In view of the legislation, both of Pennsylvania and New Jersey, the usages of fishing, and the decisions in our own State, there is a right of fishing in the Delaware, though subordinate to the right of navigation, which cannot be unnecessarily impeded by it. Fisheries attached to the riparian ownership are valuable, and command high rents. This subject will be found to be discussed at great length and with much research by brother Sharswood, in the case of the *Tinicum Fishing Co.* v. *Carter*, 11 P. F. Smith, 21. It, therefore, needs no further discussion here. The right of fishery is an acknowledged one, though it is entirely subordinate to that of navigation, and we intend, in this opinion, to lay down no principles which would burden commerce or restrict the navigator's rights, beyond that which his evident duty to others would justly require. Indeed, the question upon the charge comes down to this: Is it *wantonness*, when a mariner, warned of the net, seeing the light marking its position, and requested to avoid it, yet, indifferent to the interests of the fisherman, keeps on his course, when a reasonable pursuit of his voyage would not be prejudiced by avoiding the net? Wantonness is reckless sport, wilfully unrestrained action, running immoderately into excess. If a man will do an injury, when he may reasonably avoid doing so, without inconvenience to himself, can it be said he is blameless? Is it not worse than wantonness; is it not rather malice, where he may, without prejudice to the reasonable enjoyment of his own right, desist from an injury to another, and yet will persist in committing it? Now, unless we deny this proposition, we cannot reverse. If there were anything exceptional in the facts, or contradictory in the evidence, it was in the power of the defendant to ask specific instructions upon the precise state of the facts as appearing on either side. If, by reason of the veering of the wind to the northeast, the running of the tide with the course of the vessel, the want of men on deck at the moment, or other sufficient cause, it would have been difficult, or even unreasonably inconvenient to shorten the tack of the vessel, or change its course, the instruction might have been asked, that in such a case the master was not bound to luff or to shorten tack. We agree with the counsel of the plaintiff in error, that the interests of navigation are all-important to a port like that of Philadelphia, and are not required to give way to the minor and subordinate right of fishing. But, in absence of a call for instruction on the point so much insisted upon in the argument, we cannot say the court erred in the general instructions contained in the charge. There was evidence of malice sufficient to take the case to the jury, to whom it belonged, and not to the court, to say whether the language used — "To hell with your net" — was a mere superfluity of maritime civility, or was indicative of malice.

Judgment affirmed.

COURT OF QUEEN'S BENCH.

[LAW REPORTS, 9 Q. B. 122.]

BAILEE FOR HIRE. — LIVERY STABLE KEEPER, LIABILITY OF, FOR CARE OF CARRIAGE OF CUSTOMER. — FALL OF COACH-HOUSE.

SEARLE v. *LAVERICK.*

Where a livery stable keeper undertakes for reward to receive a carriage and lodge it in a coach-house, the case comes within the second class of the fifth sort of bailment mentioned by Holt, C. J., in Coggs v. Bernard, 2 Ld. Raym. at pp. 917, 918, *viz.: a delivery to carry or otherwise manage for reward, to a private person, not exercising a public employment; and he is bound to take reasonable care.*

The obligation, to take reasonable care of the thing intrusted to a bailee of this class involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state, so that the thing deposited may be reasonably safe in it; but no warranty or obligation is to be implied by law on his part that the building is absolutely safe.

The fact that the building has been erected for the bailee on his own ground makes no difference in his liability.

The plaintiff brought his horses and two carriages to defendant, a livery stable keeper, the carriages were placed under a shed on defendant's premises, a charge being made by defendant in respect of each. The shed had just been erected, the upper part being still in the hands of the workmen. Defendant had employed a builder to erect the shed for him, as an independent contractor, not as defendant's servant, and he was a competent and proper person to be so employed. The shed was blown down by a high wind, defendant being ignorant of any defect in it, and the carriages were injured, upon which plaintiff brought an action against defendant. At the trial, the above facts having been admitted, the judge rejected evidence to prove that the fall of the shed was owing to its being unskilfully built through the negligence of the contractor and his men; and he nonsuited the plaintiff, ruling that the defendant's liability was that of an ordinary bailee for hire, and that he was only bound to take ordinary care in the keeping of the plaintiff's carriages, and that if he had exercised in the employment of the builder such care as an ordinary careful man would use, he was not liable for damage caused by the carelessness of the builder, of which he, defendant, had no notice: Held, that the nonsuit and ruling were right. Readhead v. Midland Ry. Co., Law Rep. 4 *Q. B.* 379; *and Francis v. Cockrell, Law Rep.* 5 *Q. B.* 184, 501, *distinguished.*

DECLARATION, that in consideration of plaintiff having delivered to defendant certain carriages to be safely kept and taken care of by defendant for plaintiff, for a reward to defendant, defendant promised to safely keep and take care of the carriages. Breach, that defendant did not safely keep and take care of the carriages while they were in his keeping, whereby they were damaged.

Second count, that plaintiff delivered to defendant certain carriages to be kept in a fit and proper carriage-house or building for that purpose, and to be taken due care of by defendant for reward to him; that defendant promised so to keep the carriages in a fit and proper building. Breach, that defendant did not so keep the carriages, but kept them in a danger-

ous and insufficient shed or building, whereby the roof fell down and damaged the carriages.

Pleas: First, That defendant did not promise as alleged. Second, That plaintiff did not deliver nor defendant receive the carriages on the terms alleged. Third, A denial of the wrongful acts and breaches alleged.

Issue taken and joined.

At the trial before Pollock, B., at the Durham spring assizes, 1873, the plaintiff was nonsuited.

A rule was afterwards obtained for a new trial, on the ground of misdirection; and that on the facts opened and proposed to be proved there was evidence that the defendant had failed in his duty, and was guilty of negligence as bailee of the property.

November 21, 1873, *Holker*, Q. C. *& Shield*, showed cause.

C. Russell, Q. C. *& Lewers*, supported the rule.

The facts, course of trial, and direction of the learned judge, and the arguments of counsel, are fully set out in the judgment of the court.

In addition to the cases noted in the judgment, the following authorities were cited by counsel: Story on Bailments, ss. 4, 5, 6, and 442; *Smith* v. *Marrable*, 11 M. & W. 5; *Sutton* v. *Temple*, 12 M. & W. 52, 64; *Erskine* v. *Adeane*, Law Rep. 8 Ch. Ap. 756; *Pickard* v. *Smith*, 10 C. B. (N. S.) 470. *Cur. adv. vult.*

January 28, 1874. The judgment of the court (Blackburn, Mellor, and Lush, JJ.) was delivered by

BLACKBURN, J. This was a rule obtained to set aside a nonsuit and have a new trial, against which cause was shown in the last term before my brothers Mellor and Lush and myself.

The trial took place at Durham before my brother Pollock. The action was brought to recover damages for an injury to the plaintiff's carriages, occasioned by the fall of a building below which they were placed; and the question in the cause was whether the defendant was responsible for the injury so occasioned. It appears from the learned judge's notes, that the defendant was a livery stable keeper, and that he had contracted with a builder (not a servant of the defendant, but an independent contractor) to erect on part of his yard a building, of which the lower part was to be a shed intended for the reception of carriages, and the upper part to be used for other purposes.

The plaintiff brought his horses and two carriages to the defendant about the end of September, at which time the building was not completed, so far as to permit both carriages to be placed under it. One of the plaintiff's carriages was housed in it, the other stood at first in the open yard. The plaintiff, finding this to be the case, complained at some time in October, and was told in substance that, as soon as the shed was complete, the carriage should be put under cover, and that till then no charge would be made for it. The second carriage was placed under the shed in the last week in October, and from that time a charge was made for both carriages, until the misfortune happened which I will now mention. In November, at a time when the lower part of the building had been complete, but whilst the contractor's workmen were still in the upper part of it, the building was blown down by a high wind, and the carriages were injured.

It was not disputed that the builder was one whom a careful and prudent person might trust, and that the defendant had no notice of any negligence on the contractor's part; but the plaintiff's counsel offered to prove that, owing to the neglect of the contractor and his workmen, the building was in fact unskilfully built and unsafe, and that this was the cause of the fall. The learned judge then, as stated in his note, ruled "that defendant's liability is that of an ordinary bailee for hire, and that all he was bound to do was to use ordinary care in the keeping of the plaintiff's carriages; and that, if in causing the shed to be built he did all that he did, by employing a builder and otherwise, with such care as an ordinary careful man would use therein, he would be protected, and would be exempt from liability for an event which was caused by the careless or improper conduct of the builder, of which the defendant had no notice.

On this the plaintiff's counsel declined to give evidence as to the shed having been improperly built by the builder, the defendant having no knowledge thereof; and the plaintiff was thereupon nonsuited.

The plaintiff's counsel, having raised his point, did right in submitting, at *nisi prius*, to the ruling of the judge, and he is not precluded thereby from questioning it afterwards. And if proof that the building was unskilfully erected by the builder or his workmen, though the defendant had no knowledge of it, would have established the defendant's liability, the plaintiff is entitled to a new trial, in order that he may have an opportunity of bringing forward the evidence which, in submission to the judge's ruling, he abstained from giving at the former trial.

The question, therefore, which we have to determine is, what was the extent of the obligation of the defendant as to the security of the shed in which he lodged the plaintiff's carriages. We think it is beyond question that he did come under some obligation; but it is a different and a difficult question what the precise obligation was. We think, in the first place, that it is not, in this case, material that the building was not finished at the time when the bargain was made. No doubt it may be, under some circumstances, imprudent to lodge a carriage in an unfinished building, as it may thereby be exposed to risk from the fact that work is going on round it; and if in the present case the damage had arisen from the workmen, in the course of their work, letting fall bricks and mortar on the carriages, or from any similar cause, it would have been a question whether the defendant had not neglected his duty in placing the carriages where they were exposed to that risk. But no such question arises here. What the plaintiff offered to prove was, that due care had not been used by the builder (who was employed, not as a servant of the defendant, but as an independent contractor) to make the building reasonably safe.

Neither does it, in our opinion, make any difference that the building in which the defendant lodged the carriages had been erected for him on his own ground. It seems to us that the extent of the defendant's obligation to the plaintiff is that of an ordinary livery stable keeper, who undertakes for reward to receive a carriage and lodge it in a coach-house which he provides. The customer in the great majority of cases does not know nor care how the livery stable keeper obtains the coach-house, though he must know that he is generally tenant for years; and the obligation of the livery stable keeper implied by law must, as it seems to us, be the same in each case.

This kind of bailment is included in what, in the celebrated case of *Coggs* v. *Bernard*, 2 Ld. Raym. at p. 917, 918, Lord Holt classes as the fifth sort, viz., "a delivery to carry or otherwise manage for a reward to be paid to the bailee;" as to which, says Lord Holt, "Those cases are of two sorts: either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events."

The language of Lord Holt is general, and applies this to all that exercise "a public employment;" and in the Prætor's Edict, Nautæ, Caupones, et Stabularii, which is generally considered the origin of this head of the law, stablemen are expressly named. See Dig. lib. iv. tit. ix. l. i. But we take it to be established law that, by the custom of England, this extreme liability, making the bailee an insurer, is confined to carriers and innkeepers, and that livery stable keepers and warehousemen come within what Lord Holt calls the second sort, as to which he says, "The second sort are bailiffs, factors, and such like." As to this sort, he says the bailee is only bound to take reasonable care; and "*the true reason of the case is, it would be unreasonable to charge him with a trust further than the nature of the thing puts it in his power to perform it.* But it is allowed, in the other cases" (*i. e.* the carrier and innkeeper), "by reason of the necessity of the thing."

The obligation to take reasonable care of the thing intrusted to a bailee of this class involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state, so that the thing therein deposited may be reasonably safe in it.

If the obligation of a livery stable keeper goes no further than this, the defendant in the present case has fulfilled it, and the nonsuit was right. But the argument of the plaintiff's counsel was that the two cases of *Readhead* v. *Midland Ry. Co.* Law Rep. 4 Q. B. 379, and *Francis* v. *Cockrell*, Law Rep. 5 Q. B. 184, 501, both decided in the exchequer chamber, establish that a carrier of passengers, who for reward furnishes a carriage, and a person who lets sittings in a temporary stand built for the reception of spectators at a race, are under an obligation as to the sufficiency of the carriage and the stand which they supply much more extensive than this.

The point decided in *Readhead* v. *Midland Ry. Co.* Law Rep. 4 Q. B. 379, was, that the obligation did not extend so far as to make the carrier responsible for a latent defect, which neither he nor those who made the carriage could by proper care have prevented or detected. In *Francis* v. *Cockrell*, Law Rep. 5 Q. B. 184, 501, which was the case of a temporary stand erected by independent contractors for the defendant and then let out by him in separate sittings to, amongst others, the plaintiff, the case is treated as strictly analogous to the case of the carrier of passengers, who, having got a carriage, in the way he finds most convenient for himself, uses it for the carriage of the passenger. And in the judgment in this court, carefully prepared and delivered in writing by my brother Hannen, the question is thus stated: "It becomes necessary, therefore, for us to consider whether the contract by the defendant to be implied from the relation which existed between him and the plaintiff was that due care had been used, not only by the defendant and his servants but

by the persons whom he employed as independent contractors to erect the stand. It is said in the judgment in *Readhead* v. *Midland Ry. Co.* Law Rep. 4 Q. B. at p. 392, 'Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty as well as of the party to whom it is supposed to be given.' Applying this rule to the present case, we think that the contract of the defendant with the plaintiff did contain an implied warranty that due care had been used in the construction of the stand by those whom the defendant had employed to do the work, as well as by himself." Law Rep. 5 Q. B. at p. 198.

This decision was affirmed in the exchequer chamber. Law Rep. 5 Q. B. 501. The judgments there were not written, and in some of them, as reported, expressions are used much more favorable to the extension of the doctrine of an implied warranty than the language used in the written judgment of the same court in *Readhead* v. *Midland Ry. Co.* Law Rep. 4 Q. B. 379; but the two decisions are not in conflict, and both are binding on us.

We think that where the matter is not already decided by authority, the principle by which the court is to be guided in determining what is the obligation implied by law is that given by Lord Holt in *Coggs* v. *Bernard*, 2 Ld. Raym. at p. 918, "that it would be unreasonable to charge the bailee with a trust further than the nature of the thing puts it in his power to perform it." Which is, we think, the same principle as is expressed in the passage from the judgment in *Readhead* v. *Midland Ry. Co.* Law Rep. 4 Q. B. at p. 392, above cited by Hannen, J., in *Francis* v. *Cockrell*, Law Rep. 4 Q. B. at p. 193.

And we may observe that in Pothier, Du Contrat de Louage, partie 2nd*, chap. 1, No, 118, 119, 120, we find a similar principle laid down, though not in the same language, as being that of the old French law. That very learned author lays it down, that where the person who lets a thing on hire knows of a defect in the thing which he lets, making it unfit for the purpose for which it is let, he is responsible in damages for it. And though he does not actually know it, that if the circumstances are such that he ought to have had a suspicion of it and made inquiry, and does not either inquire or inform the hirer, so that he may inquire for himself, he is liable: which is so far equivalent to saying that he is bound to reasonable care and good faith. And further, that, if the letter follows a trade which makes it his duty to know whether the thing has faults or not, he is liable without proof that he did know. He puts as an example the case of a cooper, who supplies wine casks made of bad wood, so that they leak. Pothier says: "The cooper shall not be permitted to set up as a defence that he did not know the bad quality of the wood, for his profession bound him to know the quality of the wood he used, and to supply none but of good quality." This seems to us to say, in other words, that from the nature of the employment a warranty of the quality of the wood should be implied. But says Pothier, "Except in those cases, the letter, if he neither knows nor is bound to know the fault in the thing let, is not responsible in damages."

The difficulty, in a case not already settled by decisions, is to apply

these principles, and to say whether the nature of the relation between the parties is such that a warranty to any, and if to any, to what extent, should be implied.

On this part of the case the observations of Crompton, J., in *Brass* v. *Maitland*, 6 E. & B. at pp. 490–493; 26 L. J. (Q. B.) at pp. 56–58, are weighty.

The plaintiff's counsel on the argument in this case relied mainly on the decision in *Francis* v. *Cockrell*, Law Rep. 5 Q. B. 184, 501, and very properly, for we feel that, unless there is real difference between the relation of a person who takes a seat in a temporary stand to the person who furnishes the ticket admitting him to that stand, and the relation of the person who sends his carriage to stand in a coach-house to the livery stable keeper who supplies the coach-house, the contract to be implied in the two cases should be the same. And we feel that it is not desirable to make nice distinctions.

It is very difficult to draw the precise line between cases in which the warranty or obligation — it matters not which it is called — should be implied, and those in which it should not. But, to borrow an illustration from my brother Bramwell, though it may not be easy, or indeed possible, to say where the line should be drawn which divides day from night, it is quite clear that noon is on the one side of that line and midnight on the other; and it is enough for the decision of this case if we can see that the present case is not one in which this warranty or obligation should be implied by law. And there seem to us to be sufficient reasons for saying that it should not in this case be implied, though it was implied in the case of the carrier of passengers supplying a carriage, and in the case, considered analogous, of the person furnishing a seat in a temporary stand.

In the first place, it is to be observed that in most cases where a bailee takes care of goods he must lodge them, if dead goods, in a building so as to shelter them from the weather; if live animals, either in a stable or a fenced field; and it must have often happened that the goods were injured or lost in consequence of some defect in the building of fences.

In *Broadwater* v. *Blot*, Holt N. P. 547, the action was against an agistor for losing a horse. On an application for a nonsuit, Gibbs, C. J., said: "All the defendant is obliged to observe is reasonable care. He does not insure, and is not answerable for the wantonness or mischief of others. If the horse had been taken from his premises, or had been lost by accidents which he could not guard against, he would not be responsible. I admit that particular negligence must be proved, by occasion of which the horse was lost, or gross general negligence, to which the loss may be ascribed, in ignorance of the special circumstances which occasioned it. If there were a want of due care and diligence generally, the defendant will be liable. *The question is, Were the defendant's fences in an improper state at the time the horse was taken in to agist?* Did he apply such a degree of care and diligence to the custody of the horse as the plaintiff, who had intrusted the horse to him, had a right to expect? I shall leave it to the jury."

The passage above in italics was cited on the argument, as showing that, in the opinion of that very learned and accurate judge, the agistor would

be liable if the fences were in an improper state, however caused. But it seems to us that, when taken with the context, the fair conclusion is, that the alleged improper state of the fences was such that the agistor, if he took proper care, could not have been ignorant of it, and that it was only mentioned by Gibbs, C. J., as an instance of the absence of due care and diligence.

With this exception, no case was cited in which it was ever suggested that there was any warranty, however limited, as to the state of the place in which goods are deposited beyond what was expressed in the ruling of my brother Pollock at the trial of the case at bar. *Vid. ante.* And as far as our own research goes, there is no such case; nor can we find any suggestion to that effect in any of our text writers. In the case of the carriage supplied by a carrier, either by land or by water, it had been long a debated question whether there was not an absolute warranty: as may be seen from the authorities collected in *Readhead* v. *Midland Ry. Co.* Law Rep. 2 Q. B. 412; 4 Q. B. 379.

We are, therefore, as far as authority goes, at liberty to apply the principles before stated to this case, and see if any warranty or obligation should be implied. There is, we think, a real difference between the case of one who supplies a carriage, or a seat in a temporary stand, which is in the nature of a chattel, and one who supplies room for goods in a permanent building. We think that we must take notice of the fact, that in the general and more ordinary state of things, a warehouseman or livery stable keeper is tenant of the buildings in which he lodges the goods intrusted to him; and we know that in the ordinary case of lessor and lessee there is no implied covenant on the part of the landlord to his tenant that the building shall be fit for the purpose for which it is let. See *Hart* v. *Windsor*, 12 M. & W. 68.

We think, therefore, that in such cases an implied warranty as to the state of the building would, to borrow Lord Holt's language already cited, be unreasonable, as charging him with a trust beyond what the nature of the thing puts it in his power to perform. 2 Ld. Raym. at p. 918. It is reasonable to require him to use due care to ascertain whether the building is fit, and by himself and servants to take due care to maintain it in a proper state, but it would be unreasonable to go further.

It is true that, in some cases, the bailee is owner in fee of the building; and in some, as in the present case, he has it built for him; and even where lessee, he might take special covenants. But these are exceptional cases; and *in ea quæ frequentius accidunt præveniunt jura.* We must imply the warranty or obligation which would be reasonable in the ordinary state of things, and no more, even though in exceptional cases it might be reasonable to imply more, and though the particular case may be one of those exceptions.

We think, therefore, that the ruling of the learned judge was right, and that the rule should be discharged. *Rule discharged.*

Attorney for plaintiff: *John Scott*, for Graham & Graham, Sunderland.

Attorneys for defendant: *Bell, Broderick & Gray*, for W. W. Robson, Sunderland.

January 28, 1874.

COURT OF COMMON PLEAS.

[LAW REPORTS, 9 C. P. 38.]

PRINCIPAL AND AGENT. — SET-OFF AGAINST PRINCIPAL OF A DEBT DUE FROM AGENT. — PLEADING. — MEANS OF KNOWLEDGE.

BORRIES & another v. *THE IMPERIAL OTTOMAN BANK.*

In order to constitute a valid defence within the rule in George v. Clagett, 7 T. R. 359, the plea should show that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods; that that person sold them as his own goods in his own name as principal, with the authority of the plaintiff; that the defendant dealt with him as, and believed him to be, the principal in the transaction; and that before the defendant was undeceived in that respect the set-off accrued.

It is not necessary in such a plea, to negative "means of knowledge," that the seller was dealing as an agent.

To a count for goods sold and delivered, the defendants pleaded, that the goods were sold and delivered to them by S., then being the agent of the plaintiffs and intrusted by them with the possession of the goods as apparent owner thereof; that S. sold the goods in his own name and as his own goods, with the consent of the plaintiff; that, at the time of the sale, the defendants believed S. to be the owner of the goods, and did not know that the plaintiffs were the owners of or interested therein, or that S. was agent; and that, before the defendants knew that the plaintiffs were the owners of the goods, or that S. was agent in the sale thereof, S. became indebted to the defendants, &c., claiming a set-off.

Replication, that, before the sale by S., the defendants had the means of knowing that he was merely apparent owner of the goods and that the same were intrusted to him as agent, and that S. was agent, and as such sold the goods to the defendants. Held, that the plea was good, and the replication no answer to it.

THE second count was for goods sold and delivered, money received by the defendants for the use of the plaintiffs, and interest.

Fifth plea, as to so much of the second count as related to money payable for goods sold and delivered by the plaintiffs to the defendants, that the goods were sold and delivered to the defendants by certain persons known and carrying on business as Scheitlin & Co., then being the agents of the plaintiffs in that behalf, and intrusted by the plaintiffs with the possession of the goods as apparent owners thereof; that Scheitlin & Co. sold and delivered the goods in their own name and as their own goods, with the consent of the plaintiffs; that at the time of the sale and delivery of the goods, the defendants believed Scheitlin & Co. to be the owners of the goods, and did not know that the plaintiffs were the owners of the goods or of any of them, or were interested therein or in the said sale thereof, or that Scheitlin & Co. were agents in that behalf; that, before the defendants knew that the plaintiffs were the owners of the goods or of any of them, or interested therein, or that Scheitlin & Co. were agents in the sale thereof, Scheitlin & Co. became, and at the commencement of the suit were, and still remained indebted to the defendants in an amount equal to the plaintiffs' claim, as the drawers of certain dishonored

bills of exchange which had been refused acceptance by the drawees, and for goods bargained and sold by the defendants to Scheitlin & Co., and for work done, &c., &c., — which amount the defendants were willing to set off against the plaintiffs' claim.

Second replication to the fifth plea, — that, before and at the time when the goods were so sold and delivered to the defendants as in the plea mentioned by the persons known as Scheitlin & Co. to the defendants, they, the defendants, had the means of knowing that Scheitlin & Co. were merely apparent owners of the goods, and that the same were intrusted to Scheitlin & Co. as agents of and for the plaintiffs, and as agents of and for the plaintiffs sold and delivered the goods to the defendants.

Third replication to the fifth plea, — that, before and at the time when the goods were so sold and delivered to the defendants as in plea mentioned by Scheitlin & Co., they the defendants had the means of knowing that Scheitlin & Co. were merely apparent owners of the goods, and that the same were intrusted to Scheitlin & Co. as agents, and that Scheitlin & Co. were agents, and as agents sold and delivered the goods to the defendants.

Demurrer to the fifth plea, on the ground that it did not allege that the defendants had not the means of knowledge that Scheitlin & Co. were acting in the sale as agents. Joinder.

Demurrers to the second and third replications to the fifth plea, on the ground that, inasmuch as the defendants acted in the *bonâ fide* belief that Scheitlin & Co. were the owners of the goods, and did not know that Scheitlin & Co. were acting in the sale as agents, it was immaterial whether they had such means of knowledge as alleged. Joinder.

Udall, for the plaintiffs. The plea merely alleges that the defendants did not know that the plaintiffs were the owners of the goods, or that Scheitlin & Co. were agents. It ought to have gone on to aver that they had not the means of knowing those facts. See the precedent in Chitty Jun., on Pleading, 3d ed. 514. Smith's Mercantile Law, 8th ed. p. 152, contains a correct exposition of the law upon the subject. "The principal's right to enforce contracts made by his agent is subject," it is said, "to this rule: namely, that if the agent have been allowed to deal in his own name, the party dealing with him will enjoy the same rights against the employer as he might have exercised against his agent had that agent really been principal. Thus, when a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes the principal; and, though the real principal may appear and bring an action on that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor, in answer to the demand of the principal. This rule is to prevent the hardship under which a purchaser would labor, if, after having been induced by peculiar considerations — such, for instance, as the consciousness of possessing a set-off — to deal with one man, he could be turned over and made liable to another, to whom those considerations would not apply, and with whom he would not willingly have contracted. But if, at any time in the course of the transaction, he have *means of knowing* that the person with whom he deals is not a principal, the above reason does not apply, and

then *Cessante ratione cessat ipsa lex.*" For this the author cites *Coates* v. *Lewes*, 1 Camp. 444; *Sims* v. *Bond*, 5 B. & Ad. 389; *Bastable* v. *Poole*, 1 C., M. & R. 410; *Stracey* v. *Deey*, 7 T. R. 361, n. (c); *George* v. *Clagett*, 7 T. R. 359; *Blackburn* v. *Scholes*, 2 Camp. 341; *Carr* v. *Hinchliff*, 4 B. & C. 547; *Taylor* v. *Kymer*, 3 B. & Ad. 320; *Warner* v. *McKay*, 1 M. & W. 591. So, in the notes to *George* v. *Clagett*, 7 T. R. 359, in 2 Smith's Leading Cases, 6th ed. p. 115, it is said that "This rule only applies where the party contracting has not *the means of knowing* that the party with whom he contracts is but an agent. If he have the means of knowing, and, though he may not be expressly told, still must be supposed to have known, that he was dealing not with a principal but with an agent, the reason of the above rule ceases;" citing *Baring* v. *Corrie*, 2 B. & Ald. 137. And at page 117 it is said that, "In order to make a valid defence within the rule laid down in the principal case, the plea must show that the contract was made with a person whom a plaintiff had intrusted with the possession of the goods; that that person sold them as his own, in his own name, as principal, with the authority of the plaintiff; that the defendant *dealt with him as and believed him to be the principal in the transaction;* and that, before the defendant was undeceived in that respect, the set-off accrued." For this reference is made to the judgment of this court in *Semenza* v. *Brinsley*, 18 C. B. (N. S.) 467; 34 L. J. (C. P.) 161. In *Purchell* v. *Salter*, 1 Q. B. 197, the plea contained the averment in which this plea is deficient. The plea as here pleaded is consistent with the defendants' having had notice, and having forgotten it; as in *Raphael* v. *Bank of England*, 17 C. B. 161; 25 L. J. (C. P.) 33. [Brett, J. It is consistent with this plea that the debt sought to be set off was contracted before Scheitlin & Co. were intrusted with the goods. How is the fact?] It may be assumed to have accrued before this claim arose. [Keating, J. Is "means of knowing" anything more than evidence of knowledge?] The substantial question is, whether or not the defendant had means of knowledge. [Coleridge, C. J. I observe that Lord Denman, in giving judgment in *Purchell* v. *Salter*, 1 Q. B. at page 200, in the court below, when he states the substance of the plea omits all mention of "means of knowledge." Denman, J. In the third edition of Bullen & Leake, p. 688, there is a form of plea which omits the words you contend ought to be inserted; and in a note appended thereto, referring to *Baring* v. *Corrie*, 2 B. & Ald. 137, it is said: "If the buyer had the means of knowing him to be dealing as an agent, and negligently omitted to inform himself, it would be equivalent to knowledge, and would deprive him of the set-off."] Those words *are* found in the same form in the second edition, which is referred to in the argument in *Semenza* v. *Brinsley*, 18 C. B. (N. S.) at p. 472. It is submitted that the plea is bad and the replications good.

Holl, contra. The plea is in the form given in the 3d. edition of Bullen & Leake, p. 688, and in 3 Ch. Pl. 7th ed. 122, and adopted in *Carr* v. *Hinchliff*, 4 B. & C. 547; *Fish* v. *Kempton*, 7 C. B. 687; 18 L. J. (C. P.) 206; *Dresser* v. *Norwood*, 17 C. B. (N. S.) 466; 32 L. J. (C. P.) 201, and other cases. The real question, after all, is, whether the defendants knew that they were dealing with an agent. In *Rabone* v. *Williams*, 7 T. R. 360, n. (a), Lord Mansfield said: "Where a factor,

dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and, though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demands of the principal. This has been long settled." And in *George* v. *Clagett*, 7 T. R. 359, Lord Kenyon and the rest of the court, upon the authority of that case, held that if a factor who sells under a *del credere* commission sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demands for the goods made by the principal. [Brett, J. The marginal note is not strictly accurate.] The passage cited from 2 Smith's Leading Cases, 6th ed. 115, is not inconsistent with the authorities. In *Baring* v. *Corrie*, 2 B. & Ald. 137, the court came to the conclusion that the defendant had knowledge of the fact. Abbott, C. J. says, 2 B. & Ald. at p. 142: "The distinction between a broker and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant residing abroad or at a distance from the place of sale; and he usually sells in his own name, without disclosing that of his principal: the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation: he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name." And further on he says, 2 B. & Ald. at p. 144: "There is another circumstance which shows that if they (the defendants) did not know that Coles & Co. were acting as brokers in this case, it was because they chose not to know it. It appears that they received a sale-note, and were not required to sign a bought-note. Now, without entering into the question whether or not under such circumstances the bargain could be enforced, it is quite sufficient to say that the ordinary course of dealing was not pursued, and that enough appears to show that the defendants negligently abstained from making those inquiries which they ought to have made. I think, therefore, that they ought not to be allowed the set-off which is claimed." And Bayley, J., said, 2 B. & Ald. at p. 147: "I think the plaintiffs did not by their conduct enable Coles & Co. to hold themselves out as the proprietors of these goods, and so to impose on the defendants; that the defendants were not imposed upon; and even supposing that they were, that they must have been guilty of gross negligence." [Brett, J. Three reasons seem to have been given for the judgment, any one of which would have been sufficient.]

In *Fish* v. *Kempton*, 7 C. B. 687; 18 L. J. (C. P.) 206, Cresswell, J., says: "This is an attempt to extend the rule laid down in *Rabone* v. *Williams*, 7 T. R. 360, n. (a) and *George* v. *Clagett*, 7 T. R. 359, which has now been uniformly acted upon for many years. If a factor sells goods as owner, and the buyer *bonâ fide* purchases them in the belief that he is dealing with the owner, he may set off a debt due to him from the factor against a demand preferred by the principal." These are exactly the

terms of this plea. [Brett, J. The decision was, that the defendant knew that Tanner & Ward were selling as factors, and therefore he had no right to set off. The objection here is, that the plea does not sufficiently aver that the defendants had not notice that Scheitlin & Co. were factors.] It is not necessary to negative notice; it is enough to aver that the defendants *bonâ fide* believed that the vendors were the true owners of the goods. [Brett, J. Suppose at the trial the plaintiffs proved that the defendants had notice, and the jury find that they did not believe it?] The fact of knowledge cannot depend upon whether the information was true or false. [Coleridge, C. J. Do not the words of the plea convey to any reasonable mind that the defendants had neither notice nor knowledge? Keating, J. If notice is proved, the plaintiffs will very likely dispose of the allegation that the defendants had not knowledge.]

Udall was heard in reply.

COLERIDGE, C. J. I am of opinion that our judgment should be for the defendants. The action is brought for goods sold and delivered by the plaintiffs to the defendants. The fifth plea states that the goods were sold and delivered to the defendants by Scheitlin & Co., then being agents of the plaintiffs and intrusted by them with the possession of the goods as apparent owners thereof; that Scheitlin & Co. sold the goods in their own name and as their own goods, with the consent of the plaintiffs; that, at the time of the sale, the defendants believed Scheitlin & Co. to be the owners of the goods, and did not know that the plaintiffs were the owners of them, or were interested therein, or that Scheitlin & Co. were agents; and that before the defendants knew that the plaintiffs were the owners of the goods, or interested therein, or that Scheitlin & Co. were agents in the sale thereof, Scheitlin & Co. became indebted to the defendants, &c. It was in the first place contended by Mr. Udall that the plea should have averred not only that the defendants did not know that the plaintiffs were the owners of the goods, and believed Scheitlin & Co. to be the owners, but also that the defendants had not the means of knowing that Scheitlin & Co. were not owners, but were acting in the sale as agents. It appears to me, however, that the plea states all that is material to raise the defence. It states that the plaintiffs intrusted Scheitlin & Co. with goods for sale; that they sold them, and that the defendants bought them believing Scheitlin & Co. to be the owners of them. The essence of the defence is, the real state of the defendants' minds when they bought the goods of Scheitlin & Co. They assert that it was this: that they believed the goods to be the goods of Scheitlin & Co., and did not know or believe that the plaintiffs were the owners or interested in them. That brings the case distinctly within the rule in *George* v. *Clagett*, 7 T. R. 359; and that is the form of plea which has been commonly in use to raise a defence of this kind. I observe that in two cases, — *Purchell* v. *Salter*, 1 Q. B. 197, and *Semenza* v. *Brinsley*, 18 C. B. (N. S.) 467; 34 L. J. (C. P.) 161, — where the plea contained an averment that the defendants had no means of knowledge, no notice is taken of that allegation in the judgment. If it be necessary to aver that the defendants had not notice that the plaintiffs were the owners of the goods, I think that is substantially averred in this plea by the statement that Scheitlin & Co., with the consent of the plaintiffs, sold the goods as their own, and that the

defendants believed them to be the owners of them, and did not know that the plaintiffs were the owners. The plea being good, it follows that the replication which merely states that at the time of the sale the defendants had the means of knowing that Scheitlin & Co. were only apparent owners, and were intrusted with the goods as agents of the plaintiffs, is no answer to the plea, being a mere statement of a fact which was immaterial.

Keating, J. I am of the same opinion. The argument of Mr. Udall in substance is this: that in a plea setting up the defence in *George* v. *Clagett*, 7 T. R. 359, it is not sufficient to allege want of knowledge, without going on to negative that the defendant had the means of knowledge or notice. It seems to me, however, that this plea contains all that is essential to constitute a good defence. It states that Scheitlin & Co. were intrusted by the plaintiffs with the goods for sale; that Scheitlin & Co., with the plaintiffs' consent, sold them in their own names and as their own goods; and that the defendants bought them believing Scheitlin & Co. to be the owners of them, and not knowing that the plaintiffs were the owners, or that Scheitlin & Co. were agents in that behalf. I think it was quite unnecessary to go on and aver that the defendants had not notice or means of knowledge; for, if they had means of knowledge, that might be given in evidence under a traverse of the allegation of want of knowledge. For these reasons I entirely agree with my lord that the plea is good, and that the replications afford no answer to it.

Brett, J. The material allegations in the plea are, that the goods were sold to the defendants by Scheitlin & Co., who as agents were intrusted by the plaintiffs with the possession of the goods as apparent owners thereof, and that Scheitlin & Co. sold the goods in their own name and as their own goods, with the consent of the plaintiffs; and that at the time of the sale the defendants believed Scheitlin & Co. to be the owners of the goods, and did not know that the plaintiffs were the owners of or interested in them, or that Scheitlin & Co. were agents only. The contention on the part of the plaintiffs is, that, assuming these allegations to be true, the plea is bad for not averring that the defendants at the time of the sale had not the means of knowing that Scheitlin & Co. were acting in the sale as agents. Assuming the other averments in the plea to be true, such an averment as it is contended ought to appear in it would, as it seems to me, throw upon the purchasers of goods a burden which the mercantile law never intended should be cast upon them. "Means of knowledge" is so large and comprehensive a term that the defendants might be bound to prove that they could not by inquiry have ascertained that the plaintiffs were the owners of the goods, and that Scheitlin & Co. were acting only as agents in the sale of them. That would be manifestly unjust, seeing that the plaintiffs, by intrusting Scheitlin & Co. with the possession of the goods for sale, gave them the opportunity of representing themselves to be the real owners of them. It was further said that the plea is bad for not averring that the defendants had not notice. It is unnecessary to decide that. If it were, I should be prepared to hold that the negation of notice is involved in the affirmative allegation that Scheitlin & Co. sold the goods in their own names and as their own goods, and that the defendants bought them believing Scheitlin & Co. to be the owners and not knowing the plaintiffs

to be the owners. But, though it is not necessary, I should incline to go further and to say that, if the replication had expressly averred that the defendants had notice at the time of the sale that Scheitlin & Co. were acting merely as agents, if the allegations in the plea were true that averment would be immaterial. I take the rule of law to have been properly laid down by Willes, J., in *Semenza* v. *Brinsley*, 18 C. B. (N. S.) at p. 477, where, treating of the facts necessary to be alleged in a plea of this sort, he says, referring to the rule in *George* v. *Clagett*, 7 T. R. 359: "In order to make a valid defence within the rule above stated, it is obvious that the plea should show that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods; that that person sold them as his own goods in his own name as principal, with the authority of the plaintiff; that the defendant dealt with him as and believed him to be the principal in the transaction; and that before the defendant was undeceived in that respect the set-off accrued." In that statement of the law by that very learned judge, neither of the allegations, the absence of which is relied on here, is alluded to. Mr. Udall's reference to the precedent in Chitty Jun. 3d ed. p. 514, shows that the extreme caution of the learned editors induced them to put in something which was not absolutely necessary to the validity of the plea. I am of opinion that the plea is good, and the replications bad.

DENMAN, J. I am of the same opinion. I think the plea contains all that is essential to constitute a defence. Means of knowledge may be material evidence on the trial. So, the allegation of notice would be merely stating matter of evidence. *Judgment for the defendants.*

Attorneys for plaintiffs: *Williamson & Hill*, for Ingleden & Daggett, Newcastle-upon-Tyne.

Attorney for defendants: *Clements.*

November 20, 1873.

COURT OF QUEEN'S BENCH.

[LAW REPORTS, 9 Q. B. 66.]

NEGLIGENCE. — RAILWAY COMPANY. — INVITATION TO PASSENGERS TO ALIGHT.

LEWIS AND WIFE v. *THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY.*

The plaintiff was a passenger on the defendants' railway from A to B; while the train was passing through B station the company's servants called out the name of the station, and shortly afterwards the train stopped. The carriage in which the plaintiff travelled stopped a little way beyond the platform, and several carriages and the engine, which were in front of that carriage, stopped at some distance from the platform. The plaintiff, who was well acquainted with the station, in alighting from the carriage was thrown down and injured in consequence of the train being backed into the station for the purpose of bringing the carriages

alongside the platform. A very short interval elapsed between the time that the train stopped and the time it was backed into the station: Held, that there was no evidence of negligence on the part of the company to render them liable to an action.

APPEAL from the county court of Middlesex holden at Westminster.

This was an action of tort commenced in the court of queen's bench and remitted to the Westminster county court, under 30 and 31 Vict. c. 142, s. 10.

The plaint alleged that the action was for negligence in carrying the wife as a passenger upon the defendants' railway, whereby she was injured, and for the loss of services sustained by the husband, and for medical expenses incurred by him.

The cause was tried on the 21st of February, 1872, before the judge and jury, when the jury found a verdict for the plaintiffs, with damages £20. This verdict was, on the application of the defendants, set aside by the judge, and a new trial was ordered. On the 21st of June, 1872, the cause was again tried before the judge and a jury.

The evidence given on behalf of the plaintiffs, so far as is material, is as follows: The plaintiff, Mary Ann Lewis, on her examination-in-chief, said: "On the 7th of October, 1871, at a few minutes past seven in the evening, I started from St. Mary Cray for Bromley, in a third-class carriage of defendants. I paid 4*d.* for my ticket. The train was late at St. Mary Cray. When it arrived at Bromley station, I heard 'Bromley' called out several times. I know the station well. After I heard 'Bromley' called out the train stood still. I was in the act of getting out, and a gentleman in the same compartment with me opened the door. I had a basket and large parcel. When the gentleman opened the door I wanted to get my basket; he wished me to get out first, and said he would hand me out my goods. I put my hand on the door, and my foot on the step, and a sudden jerk of the train threw me off the step on to the end of the platform. When I got up and was getting out of the carriage the train was quite still; the sudden jerk threw me down. I fell on the edge of the platform, just clear of the bridge, where the platform joins the bridge. I fell just off the platform. The jerk of the train threw me from the edge of the door on to the platform. I would have fallen on the platform provided there had been sufficient ground to hold me. Some wires were outside; but for those wires I should have been under the railway carriage; they protected me from the wheels of the railway carriage. The carriage I was in went close to the edge of the platform, as near as it could be. If the train had been a little farther I would have fallen or been upon the platform. After the jerk the train shunted back some distance. My knee was very much hurt. I was taken to a cab. Before that, the guard asked me if I heard him call out 'Bromley.' I said I did not. He said he called out 'Keep your seats.' I did not hear any one call out 'Keep your seats.' I told the guard that."

On cross-examination she said she knew the Bromley station very well. "I had observed it many times before this occasion. I knew the platform goes quite up to the brick work of the bridge; the brick work of the bridge in fact joined the end of the station. When I fell I did not come upon the ground. I was thrown suddenly from the step of the carriage; one foot was on the step, and my hand was on the carriage door; I was suddenly thrown

from the carriage door to the edge of the platform. I came on to the wires. The wires adjoin the platform; they come quite up to it; they are lower than the platform. I found myself at the edge of the platform upon the ground." Question: "As the platform comes up close to the end of the bridge, you were under the bridge?" Answer: "I could not be under the bridge." Question: "If the platform came absolutely to the bridge, and you were under the bridge, you would not have fallen on the platform?" Answer: "It was not far under the bridge." Question: "Could you have been under anywhere else than under the bridge?" Answer: "I could not be under the bridge." Question: "What were you near?" Answer: "The brickwork of the platform. The brickwork was above me. There were other persons in the carriage. After the train stopped I prepared to get out. The gentleman said I was to get out, and he would hand me out my basket and parcels. I was in the act of stooping down to lift them up myself; he opened the door. He did not caution me not to get out because it was dangerous to do so. I do not know whether any other passenger opened the door. I could not say whether any one from the outside opened it. There was no one close by. I did not open the door. Previous to leaving the train I did not hear any one call out 'Keep your seats;' I heard only 'Bromley, Bromley.' I travel on the line sometimes once or twice a week, and I know it is the practice to call out the name of the station as the train comes up to it."

On reëxamination the witness said: "The train was perfectly still when I endeavored to get out. I was in the front part of the train, not in the back part of the carriage." In answer to the judge she said: "There is an archway at the further end of the platform coming from St. Mary Cray, and the railway goes under it. The platform goes up to the bridge and adjoins it. Part of the train was standing under the bridge when I got out, and the engine was on the other side. My carriage was just at the end of the platform. If my carriage had been a little further back I should have fallen on to the platform. I do not know that I fell against an iron bar. I could not tell. There is an iron bar adjoining the platform; that is the bar the wire is on."

Richard Elliott said: "On the 7th of October I came in the train from Sevenoaks junction to Bromley; the train was due at Bromley at 7. 29 P. M.; it was late. When the train came to Bromley station several officials called out 'Bromley.' I was in the hind part of the train, and had my basket in the back of the train in the luggage break. After 'Bromley' was called out the train stopped. I got out and went to the back part of the train. I walked seven or eight yards, and then the train shunted back about three or four rods. I did not hear any guard call out, 'Keep your seats.'"

Thomas Strong said: "I am a plumber and glazier, and reside at Bromley. I was a passenger in the train from St. Mary Cray. I was in the fore part of the train. I had my basket and my frame of glass on my back. When we got to Bromley station I heard 'Bromley' called out three times. The train came to a stand; my basket was on the seat of the carriage. I took my basket in my hand when the train stopped. The frame was strapped on my back. I stood upright, and bent over to take hold of the handle of the door; all at once the train shunted back

and threw me back, and my glass went against the back of the carriage and two large sheets of glass were broken. I was not injured. I did not attempt to get out when the train gave me that jerk. I stopped till it came to a stand again. I heard no one call out, 'Keep your seats.'"

On cross-examination he said: "They may have called out, 'Keep your seats,' but I did not hear them. I was in the fore part of the train, near the engine, with my back to the engine, up at the fore end of the train underneath the bridge. I was in the fore part of the train as it ran up through Bromley. I put my arm over towards the door, and then the train shunted back and gave me a jerk, and then I stayed till the train went back and came to a stand. I am almost certain I was within three or four carriages of the engine. I cannot say how much I was under the bridge; I should not call the fore part that part that was going to London. I should call it the back part of the train."

In answer to the judge the witness said: "I know some portion of the train was a long way beyond the station where it used to stay. I was thrown back. I was incumbered with the glass at my back; after the jerk the train put back." In answer to a juror the witness said: "I cannot exactly say whether the carriage I was in when I first attempted to get out was under the bridge."

At the conclusion of the plaintiffs' case the judge stated that, in his opinion, there was no evidence of negligence on the part of the defendants to go to the jury, and that it was his duty to direct a nonsuit, but the plaintiffs refused to be nonsuited; the judge thereupon directed the verdict to be entered for the defendants.

The question for the consideration of the court was, whether the verdict entered for the defendants ought to be set aside and a new trial ordered.

B. F. Williams, for the plaintiffs. The defendants were guilty of negligence. The officials called out "Bromley," and then the train stopped. The female plaintiff reasonably supposed, under these circumstances, she was to alight. The calling out the name of the station, coupled with the stopping of the train, was an invitation to her to get out of the carriage. *Cockle* v. *London and South Eastern Ry. Co.* Law Rep. 7 C. P. 321. While she is acting on the invitation, and is about to get down from the carriage, the train is suddenly shunted back and she is injured. Shunting back the train without notice is an absence of ordinary care in the management of the train, and is negligence for which the defendants are liable.

W. G. Harrison, for the defendants, was not called upon.

BLACKBURN, J. I think it is not necessary to hear the defendants' counsel. The question is, whether (the woman having unquestionably sustained an injury) the judge could say there was evidence on which the jury could reasonably find that there was negligence on the part of the defendants or their servants, which occasioned injury to the plaintiff. The facts appear to be abundantly clear on the female plaintiff's own story. It appears that the train was coming up to the station, and some official on the platform called out, "Bromley — Bromley." Calling out the name of the station I understand, and have always understood, to mean this, that it is an intimation to all who are travelling by the train that the station at which the train is about to stop is that particular station. When the ser-

vants of the defendants called out "Bromley," the train was still going forward, and the train, by one of those accidents that will sometimes occur, overshot the platform, so that, as the plaintiff herself said, the engine went beyond the bridge, and part of the train went under the bridge and passed the platform. Immediately after that there was an order given for the train to come back to the platform, and the train was backed. The female plaintiff had in the mean time proceeded to get out, and in trying to get out, and in consequence of trying to get out at the time the train began to back, a jerk comes, throws her down, causing the injury. The question is, whether there was negligence on the part of the defendants' servants causing her to get out at the time and place she did? Mr. Williams has argued that if the plaintiff supposed she was to get out at the place at which the train stopped, and was injured, the defendants are liable. I do not think so, unless that supposition was induced by the acts of the company's servants; but the plaintiff could not have supposed that, because she says that she knew the place well; that she saw her carriage was not alongside the platform, but at the edge or the corner of it, and that part of the train was beyond the platform. I see no evidence in this case of an act on the part of the company's servants to induce her or to justify her in alighting at the spot where she was getting out. From all the circumstances she, as a reasonable person, must have believed that the train, which had passed the platform, would come back again; that it would not stop under the bridge and let the passengers in the further carriages get out upon the line; and, consequently, she had no business to get out at the place she did unless the company's servants told her to do so. There was, therefore, no evidence from which the jury could have reasonably found negligence. I do not agree with Mr. Williams that calling out the name of a station is an invitation to passengers to alight. On the contrary, the name of the station is generally called out as the train is passing on. Every person must have heard porters at a railway station call out something, which, if he happens to know the name of the station, he can recognize; if not, it frequently happens that the passenger cannot make out what name it is that the porters are calling out. Calling out the name of a station is not an invitation to alight. *Cockle* v. *London & South Eastern Ry. Co.* Law Rep. 7 C. P. 321, is distinguishable. In that case there was clear evidence that the train had been brought to a final standstill, and that the passengers were to get out at that place, or not at all. I think there was no evidence on which the jury could find for the plaintiffs, and that consequently the judge was right in directing a verdict for the defendants.

QUAIN, J. I am of the same opinion. This is a case manifestly where the female plaintiff had no reasonable ground for believing that the train had finally stopped, so as to entitle her to alight at the particular spot. She says herself that she knew the station very well, and that she had been in the habit of travelling on the line once or twice a week. She was in the front part of the train. Four carriages in front of her, as well as the engine and tender, had actually shot so far beyond the platform that they were at the other side of the bridge, and her own carriage was close to the end of the platform and well up to the bridge. She knowing the place, when she looked out and saw the position of the train, must have

seen at once that the train was not in its proper position; and if she had thought for a moment, she must have known that the train would be backed in order to get it into its proper place alongside of the platform. With a knowledge of the station, and without any express invitation to alight, and without having the door opened for her by any porter — only having heard "Bromley," called out — which is done to give notice to the passengers that the train had arrived at that particular station, and that they were to prepare to alight — she gets out. The company had done no act to induce her to believe that the train had arrived at a place where it would stop, so as to justify her in assuming that the company had given her an invitation to alight at that particular spot. I think the verdict was right.

ARCHIBALD, J. I am also of opinion that there was no evidence in this case to go to the jury. No doubt there may be conduct on the part of the company, and the circumstances may be such as to amount to an invitation to get out without the actual opening the door and bidding the passengers to alight. If the train is in its proper place, or if the train is allowed to stand still for a sufficient length of time, there may be, under some circumstances, an intimation at least that the passengers may alight. But the circumstances are entirely different here. The train had reached beyond the platform; for, according to the evidence, it is clear that a considerable portion of it was beyond the bridge, and the carriage in which the plaintiff herself was travelling was next to the corner of the platform. The slightest attention on her part must have made her aware that, as matters stood, it was dangerous for her to alight. She, knowing the station as she did, must have come to the reasonable conclusion that that was not the place she ought to alight at; that there was something more to be done, and that the train would be pushed back before it was right and proper for her to alight. Being well acquainted with the platform and the station — and the evidence showing that the train did not wait a sufficient time and give her fair intimation that she might alight without danger — she chooses to get out of the carriage. The evidence as to the time the train stopped shows it was only for a few seconds. One of the witnesses states that he had a frame strapped on his back; he had not to wait to put it on; and that when the train stopped he stood up immediately, and then he put his hand on the door; the train shunted back. We may conclude that he was an active man, carrying a burden, and therefore did not lose much time in attempting to get out of the carriage; but he says before he got out of the carriage the train shunted back, so that the female plaintiff must have got out very hastily and in a great hurry, and at a time when there was nothing done on the part of the company, or their servants, that she might have taken to be an intimation or invitation that she might safely get out. Under these circumstances, I think the verdict was right. *Judgment for the defendants.*

Attorneys for plaintiffs: *Martin, Gregory & Boreman.*

Attorney for defendants: *J. C. Church.*

November 11, 1873.

COURT OF EXCHEQUER.

[LAW REPORTS, 9 EX. 54.]

TROVER. — ACTION BY PURCHASER FOR GOODS SUBJECT TO VENDOR'S LIEN FOR UNPAID PURCHASE MONEY.

LORD v. *PRICE.*

The purchaser of goods which remain in the possession of the vendor subject to the vendor's lien for unpaid purchase-money cannot maintain an action of trover against a wrong-doer.

ACTION of trover tried in the passage court, Liverpool, on the 8th of November, 1873. The plaintiff, on the 15th of August, bought at an auction two lots of damaged cotton, part of the salvage from a fire, under conditions which, so far as is material, were as follows: —

"2. All the cotton, as allotted, is to be at purchaser's risk as to fire, theft, disarrangement of lots, or loss in any respect, from the falling of the broker's hammer, and to be taken away before Saturday next, the 16th instant, at four o'clock, P. M.; and if any should remain after that time, the cotton remaining will be sold without notice, the deposit forfeited, and the loss (if any) to be made good by the defaulter.

"3 A deposit of £50 per heap and £10 per lot to be paid at the time of sale of each lot, and payment of the balance in cash, less 1½ per cent. discount, to be made immediately after at the broker's office, and before delivery of the cotton."

The plaintiff paid the deposit on the two lots, but did not pay the residue of the purchase money, and left the cotton in the field where the auction had been held.

On the same day he removed one of the lots; but on going on the 18th of August to fetch the other lot, he found that it was gone. It had, in fact been taken by the defendant, who was also a purchaser at the sale, by mistake for a lot which had been bought by him, and the plaintiff (whose purchase money was still unpaid) now sued him for the alleged conversion. The learned assessor, on the defendant's application, nonsuited the plaintiff, on the ground that the vendor's lien for unpaid purchase money prevented him from maintaining an action of trover, and gave leave to the plaintiff to move the court of exchequer for a new trial. A rule having been obtained accordingly,

Gully showed cause. In order to maintain this action the plaintiff must have the right to present possession. But the plaintiff has no such right. It is true that the property in the goods passed to him, but the vendor's lien for unpaid purchase money deprived him of the right to possession, which the vendor retained. *Bloxam* v. *Sanders*, 4 B. & C. 941, at p. 948; *Milgate* v. *Kebble*, 3 M. & G. 100. The owner, therefore, could have maintained an action against the defendant, and the plaintiff cannot, for it cannot be that both can sue. Similarly a mortgagee, under a bill of sale of chattels, of which the mortgagor is to remain in

possession until default in payment, cannot maintain trover for them; *Bradley* v. *Copley*, 1 C. B. 685; nor a landlord for chattels leased to a tenant. *Gordon* v. *Harper*, 7 T. R. 9. The plaintiff's remedy is not in this form of action, but by a special action for injury to his interest in the goods, as in *Mears* v. *London and South Western Ry. Co.* 11 C. B. (N. S.) 850; 31 L. J. (C. P.) 220. This course would secure the rights of all parties, but if the plaintiff can recover without paying for the goods, the vendor's lien will be lost. Possibly also, by now paying or tendering the price, the plaintiff might entitle himself to recover in trover. In any case he is not without remedy, for he may treat the vendor as his trustee, and on giving an indemnity, sue in his name.

Myburgh, in support of the rule. It is true the plaintiff has no right to present possession as against the vendor, but the vendor's right is for his own benefit, and the defendant, who is merely a wrong-doer, cannot take advantage of it.

BRAMWELL, B. I am of opinion that this rule must be discharged, on the ground that the action cannot be maintained without a right of present possession in the plaintiff. Here there is no evidence that the plaintiff had any right of possession; that right was in the vendor, who was entitled to retain possession of the goods until the balance of the purchase money was paid, and, on non-payment, to resell the goods and recoup himself for any loss sustained on the resale. Therefore, if the goods were tortiously removed (and there is no evidence that the vendor assented to their removal), it is manifest that the vendor could have maintained an action. But it cannot be that two men can be entitled at the same time to maintain an action of trover for the same goods. It is, therefore, abundantly manifest that the vendor could, and that the plaintiff cannot, maintain this action.

Whether, by paying the balance of the price now, or tendering it, the buyer can, either in an action of trover or by a special action on the case, have any remedy at common law in his own name, or whether he is limited to an action in the name of the vendor, it is not necessary now to pronounce. It is sufficient to say that, on the facts shown here, the plaintiff cannot recover.

AMPHLETT, B. I am of the same opinion. I should be sorry to suppose that the plaintiff could have no remedy. No doubt, on paying the balance, he would be entitled to relief, either at law or in equity. But it is sufficient to say here that he has not done those acts which were necessary to entitle him to the possession of the goods, and that he cannot therefore maintain this action. *Rule discharged.*

Attorneys for plaintiff: *Lowndes & Co.*, Liverpool.

Attorney for defendant: *Lupton*, Liverpool.

January 30, 1874.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1873.]

BANKRUPTCY. — EQUITABLE SET-OFF.

MOSES W. GRAY, Appellant, v. *WILLIAM E. ROLLO, Assignee in Bankruptcy of the Estate of the Merchants' Insurance Company.*

1. *Set-off is enforced in equity only where there are mutual debts or mutual credits, or where there exists some equitable consideration or agreement between the parties which would render it unjust not to allow a set-off.*
2. *Where a bankrupt owes a debt to two persons jointly, and holds a joint note given by one of them and a third person, the two claims are not subject to set-off under the bankrupt act, being neither mutual debts nor (without more) mutual credits.*
3. *Where one of two joint debtors becomes bankrupt, it seems that the creditor may set off the debt against his separate indebtedness to the bankrupt, because each joint debtor is liable to him* in solido *for the whole debt; but, if this be conceded, it does not follow that if one of two joint creditors becomes bankrupt, the common debtor may set off against the debt a separate claim which he has against the bankrupt, for this would be unjust to the other joint creditor.*
4. *A and B were joint makers of certain notes, which were transferred to an insurance company. B and C held policies in this company which became due in consequence of loss by fire. The company being bankrupt, its assignee claimed the full amount of the notes from A and B. B sought to set off against his half of the liability the claim due to him and C on the policies of insurance, the latter consenting thereto: Held, that this was not a case for set-off within the bankrupt act, the two obligations having been contracted without any reference to each other.*

APPEAL from the circuit court of the United States for the Northern District of Illinois.

Justice BRADLEY delivered the opinion of the court.

The bill in this case was filed to compel a set-off of alleged mutual debts. The Merchants' Insurance Company, when it became bankrupt by the great fire at Chicago, held two promissory notes for $5,555 each, made by the complainant Gray, jointly with one Gaylord, and which the company had received from the payee in the regular course of business. By the fire referred to, Moses W. Gray, the complainant, and his brother, Franklin D. Gray, doing business under the firm of Gray Brothers, suffered largely in the destruction of buildings, for which they held insurance in the said insurance company, whereby the latter became indebted to them in the sum of $30,000 on three several policies. Now the complainant alleges that his just share of liability on the two notes is one half of the amount, and he desires to have that half extinguished by a set-off of the like amount due on the policies. It is true, the money due on the policies is not due to him alone, but to Gray Brothers. But he states that his brother assents to, and authorizes, such appropriation; and the bill, being demurred to, must be taken as true. The question is, whether set-off can be allowed in such case? The language of the bankrupt act, on the subject of set-off, is: "That in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and

one debt set off against the other, and the balance only shall be allowed or paid." 14 Stat. 526, § 20. It is clear that these claims are not mutual debts. They are not between the same parties. The notes exhibit a liability of the complainant and Gaylord; the policies, a claim of the complainant and his brother. But it is said that by the law of Illinois all joint obligations are made joint and several; and, therefore, that the complainant is separately liable on the notes, and could be sued separately upon them. Granting this to be so, the debts would still not be mutual. If sued alone on the notes, the claim on the policies, which he might seek to set-off, *pro tanto*, against the notes, is a claim due not to him alone, but to him and his brother. His brother's consent that he might use the claim for that purpose would not alter the case. Had his brother's interest been assigned to him before the bankruptcy of the company, and without any view to the advantage to be gained by the set-off, the case would be different.

Nor does the case present one of mutual credit. There was no connection between the claims whatever, except the accidental one of the complainant's being concerned in both. The insurance company, so far as appears, took the notes without any reference to the policies of insurance; and Gray Brothers insured with the company without any reference to the notes. Neither transaction was entered into in consequence of, or in reliance on, the other; and no agreement was ever made between the parties that the one claim should stand against the other. There being neither mutual debts nor mutual credits, the case does not come within the terms of the bankrupt law. If it can be maintained at all, it must be upon some general principle of equity, recognized by courts of equity in cases of set-off; which, if it exists, may be considered as applicable under an equitable construction of the act. But we can find no such principle recognized by the courts of equity in England or this country, unless in some exceptional cases which cannot be considered as establishing a general rule. In Pennsylvania, it is true, set-off is allowed in cases where the claims are not mutual, and, in that State, under the decisions there, it is probable that set-off would be allowed in such a case as this. But we do not regard the rule adopted in Pennsylvania as in accord with the general rules of equity which govern cases of set-off. We think the general rule is stated by Justice Story, in his treatise on Equity Jurisprudence, sect. 1437, where he says: "Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or conversely, of a separate debt against a joint debt; or, to state the proposition more generally, they will not allow a set-off of debts accruing in different rights. But special circumstances may occur creating an equity, which will justify even such an interposition. Thus, for example, if a joint creditor fraudulently conducts himself in relation to the separate property of one of the debtors, and misapplies it so that the latter is drawn in to act differently from what he would if he knew the facts, that will constitute, in a case of bankruptcy, a sufficient equity for a set-off of the separate debt created by such misapplication against the joint debt. So, if one of the joint debtors is only a surety for the other, he may, in equity, set off the separate debt due to his principal from the creditor; for in such a case the joint debt is nothing more than a security for the separate debt of the principal; and,

upon equitable considerations, a creditor who has a joint security for a separate debt cannot resort to that security without allowing what he has received on the separate account for which the other was a security. Indeed, it may be generally stated that a joint debt may, in equity, be set off against a separate debt, where there is a clear series of transactions, establishing that there was a joint credit given on account of the separate debt." Other instances are given by way of illustration of the principle on which a court of equity will deviate from the strict rule of mutuality, allowing a set-off; all of them based on the idea that the justice of the particular case requires it, and that injustice would result from refusing it; but none of them approaching in likeness to the case before the court. There is no rule of justice or equity which requires that Gray Brothers should be paid, in preference to other creditors of the insurance company, out of the specific assets represented by the notes of Gray and Gaylord. If the complainant instead of the insurance company were bankrupt, and the notes were valueless, his brother and the creditors of Gray Brothers would think it very hard if the company were allowed to pay the insurance *pro tanto* with that worthless paper.

The case of *Tucker* v. *Oxley*, 5 Cranch, 34, which arose out of the bankrupt act of 1800, has been pressed upon our attention by the counsel of the appellant, on the supposition that it is decisive in his favor. The clause relating to set-off contained in that act (2 Stat. 33, § 42) does not materially differ from the corresponding clause in the act of 1867. Mutual credits given, and mutual debts existing, before the bankruptcy, are made the ground of set-off in both acts. But the case of *Tucker* v. *Oxley* will be found to differ from the present. There two persons by the name of Moore, being partners, became indebted to Tucker. They afterwards dissolved partnership, and Tucker became indebted to one of them, who continued the business, and who afterwards became bankrupt. Oxley, the assignee, sued Tucker for this debt, but the latter was allowed to set off his claim against the two. The court put the decision upon the ground that the debt due from the two Moores to Tucker could have been collected from the property of either of them, and was provable under the bankruptcy proceedings against the estate of him who became bankrupt, and hence it might be set off against any claim which the bankrupt had against Tucker. The case, therefore, was the same as the case before us would have been if the complainant had been solely entitled to the insurance money, and if he and not the company had become bankrupt. In such case the company, according to the case of *Tucker* v. *Oxley*, could have set off the notes of the complainant and Gaylord against the claim for insurance. The reciprocal form of this rule would have enabled the complainant to succeed in this case had he been the sole claimant of the money due for insurance. In other words, the case of *Tucker* v. *Oxley* decides that a *joint indebtedness* may be proved and set off against the estate of either of the *joint debtors* who may become bankrupt, and the fact that it may be subject to be marshalled makes no difference. The joint debtors are severally liable *in solido* for the whole debt. But the case does not decide that a *joint claim*, that is to say, a debt due *to* several *joint creditors*, can be set off against a debt due *by* one of them. If a debt is due to A and B, how can any court compel the appropriation of it

to pay the indebtedness of A to the common debtor without committing injustice toward B? The debtor who owes a debt to several creditors jointly cannot discharge it by setting up a claim which he has against one of those creditors, for the others have no concern with his claim and cannot be affected by it; and no more can one of several joint creditors, who is sued by the common debtor for a separate claim, set off the joint demand in discharge of his own debt, for he has no right thus to appropriate it. Equity will not allow him to pay his separate debt out of the joint fund. And if he had the assent of his co-obligees to do this, it would be unjust to the suing debtor, because he has no reciprocal right to do the same thing.

The case before us, therefore, is clearly distinguishable from that of *Tucker* v. *Oxley*, and the ground on which that case was put is not applicable to this.

The decree must be affirmed.

SUPREME COURT OF PENNSYLVANIA.

[MARCH 2, 1874.]

DISSOLUTION OF PARTNERSHIP. — NOTICE.

SCHLATER v. *WINPENNY.*

A was told in January, 1868, *that B's partnership was for one year. Held, that A in January,* 1869, *had such notice of its dissolution as put him on inquiry.*

ERROR to district court of Philadelphia.

Opinion by WILLIAMS, J. There are three questions in this case: —

1st. Whether the partnership of F. Schlater & Co. expired on the 1st of January or the 13th of February, 1869?

2d. If on the former day, whether the plaintiff below had notice of its dissolution?

3d. Whether John Clendenning was authorized to wind up the affairs and settle the business of the partnership after its dissolution?

I. The evidence shows that the plaintiff sold yarns after the 1st of January, 1869, to John Clendenning, who was authorized by power of attorney, bearing date the 17th of January, 1868, "to buy and sell goods and merchandise," for and in the name of the firm, and that the price of these yarns was included in the notes sued on. The plaintiff himself testified that "these notes were given for a balance of account and are renewals of others." If then the partnership expired on the 1st of January, 1869, and the plaintiff had notice of its dissolution, it is clear that he is not entitled to recover that portion of the notes embracing the price of the yarns sold after that date, even if John Clendenning, by whom they were given, was authorized to settle the business of the partnership. It is, therefore, a material question, whether the partnership expired on the 1st of January, 1869, or was dissolved on the 13th of February thereafter.

Clendenning was examined as a witness for the plaintiff, and testified that the partnership continued until the 13th of February, 1869, and that it was then dissolved. On his cross-examination he said that he did not tell Benj. Rowland, Jr., that this firm expired January 1st, 1869; and that he did not tell him that all coal charged to F. Schlater & Co. after that date must be re-charged to himself, as the firm expired January 1st, 1869; and that the coal was not so re-charged, and he did not pay the bill for the same. The defendants called Rowland, who testified: "We furnished coal to F. Schlater & Co. In January and February, 1869, we charged coal to F. Schlater & Co. and sent the bill to Schlater & Co." The defendant then offered to show that Clendenning gave notice to the witness that this partnership ended January 1st, 1869, and that as to the coal charged to F. Schlater & Co. after January 1st, 1869, Clendenning said that it was to be re-charged to John Clendenning; and that it was so re-charged and paid by Clendenning, and that this notice was given before the date of these notes. The plaintiff objected to the offer and the court sustained the objection. The defendant then offered to prove by the witness the declarations of Clendenning that the firm of F. Schlater & Co. was dissolved January 1st, 1869. This offer was objected to unless the plaintiff was present and had notice of the dissolution, and the court sustained the objection and excluded the offer. If anything in the law of evidence can be regarded as settled, it is, that the credit of a witness may be impeached by proof that he has made statements out of court contrary to what he has testified at the trial. The principle is too familiar to need the citation of any authority in its support. The matter in regard to which it was proposed to contradict the witness was material and relevant to the issue; and his attention was called to the person and the particular circumstances involved in the supposed contradiction. The offers should, therefore, have been admitted, and the court fell into a palpable error in rejecting them.

II. If the defendant informed the plaintiff in January or February, 1868, that the partnership was for one year, and that it ended on the 1st of January, 1869, then the latter had such notice of its dissolution as should have put him upon inquiry. He had no right to sell goods to Clendenning on the credit of the firm after that date without ascertaining that the partnership still continued.

III. The dissolution of the partnership, whether it terminated on 1st of January or the 13th of February, 1869, undoubtedly operated as a revocation of the power of attorney authorizing Clendenning to conduct its business, and unless he was authorized by the members of the firm to settle the business of the partnership after its dissolution, he had no authority to give the notes in controversy. On his cross-examination he said: "I exercised no powers except under the letter of attorney, which was for the business of F. Schlater & Co.;" but on his reëxamination he said: "I had authority to wind up the affairs of the firm, after dissolution." In saying this he may have supposed that under the power authorizing him to conduct the business of the firm he had authority to wind up and settle its affairs; or he may have so testified because he was expressly authorized by the members of the firm to settle the business of the partnership after its dissolution. But be this as it may, it is clear

that the defendant had the right to contradict the witness by showing that he had no power as attorney in fact of the firm, after the dissolution thereof, to wind up its affairs, and, therefore, the court erred in sustaining the objection to the offer unless followed by proof of notice to the plaintiff.

The authority conferred by the power of attorney to conduct the business of the firm, as already suggested, ceased with the dissolution of the partnership, and if the plaintiff knew that the firm was dissolved when the notes were given, as it is manifest that he did, it was his business to see that Clendenning had authority to give them.

It needs no argument to show that the defendant was not bound by the entries made by Clendenning, or by his direction, in the partnership books after the dissolution of the firm; nor were they evidence against him, unless it was shown that he had assented to them.

Judgment reversed and a venire facias de novo awarded.

Edward R. Worrell, Esq., for plaintiff in error.

Richard P. White, Esq., for defendant in error.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1873.]

CONSTITUTIONAL LAW. — FOURTEENTH AMENDMENT. — INTOXICATING LIQUOR.

F. BARTEMEYER, SR., plaintiff in error, v. *THE STATE OF IOWA.*

1. *The usual and ordinary legislation of the states regulating or prohibiting the sale of intoxicating liquors raises no question under the Constitution of the United States prior to the fourteenth amendment of that instrument.*
2. *The right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States which by that amendment the states were forbidden to abridge.*
3. *But if a case were presented in which a person owning liquor or other property at the time a law was passed by the state absolutely prohibiting any sale of it, it would be a very grave question whether such a law would not be inconsistent with the provision of that amendment which forbids the state to deprive any person of life, liberty, or property without due course of law.*
4. *While the case before us attempts to present that question, it fails to do it, because the plea, which is taken as true, does not state, in due form and by positive allegation, the time when the defendant became the owner of the liquor sold; and, secondly, because the record satisfies us that this is a moot case, made up to obtain the opinion of this court on a grave constitutional question, without the existence of the facts necessary to raise that question.*
5. *In such a case, where the supreme court of the state to which the writ of error is directed has not considered the question, this court does not feel at liberty to go out of its usual course to decide it.*

IN error to the supreme court of the State of Iowa.

Justice MILLER delivered the opinion of the court.

Bartemeyer, the plaintiff in error, was tried before a justice of the peace on the charge of selling intoxicating liquors, and acquitted. On an appeal to the circuit court of the State the defendant filed the following plea:—

"And now comes the defendant, F. Bartemeyer, Sr., and for plea to the information in this cause says: He admits that at the time and place mentioned in said information he did sell and deliver to one Timothy Hickey one (1) glass of intoxicating liquor called whiskey, and did then and there receive pay in lawful money from said Hickey for the same. But defendant alleges that he committed no crime known to the law by the selling of the intoxicating liquor hereinbefore described to said Hickey, for the reason that he, the defendant, was the lawful owner, holder, and possessor, in the State of Iowa, of said property, to wit, said one glass of intoxicating liquor, sold as aforesaid to said Hickey, prior to the day on which the law was passed under which these proceedings are instituted and prosecuted, known as the act for the suppression of intemperance, and being chapter sixty-four (64) of the revision of 1860; and that, prior to the passage of said act for the suppression of intemperance, he was a citizen of the United States and of the State of Iowa."

Without any evidence whatever the case was submitted to the court, the parties waiving a jury, and a judgment was rendered that the defendant was guilty as charged. A bill of exceptions was taken, and the case carried to the supreme court of Iowa, and that court affirmed the judgment of the circuit court, and rendered a judgment for costs against the present plaintiff in error.

There is sufficient evidence that the main ground relied on to reverse the judgment in the supreme court of Iowa was, that the act of the Iowa legislature, on which the prosecution was based, was in violation of the Constitution of the United States.

The opinion of that court is in the record, and, so far as the general idea is involved, that acts for suppressing the use of intoxicating drinks are opposed to that instrument, they content themselves with a reference to the previous decisions of that court, namely, *Our House No. 2* v. *The State*, 4 G. Greene, 172; *Zumhoff* v. *The State*, 4 Ib. 526; *Santos* v. *The State*, 2 Iowa, 165. But, referring to the allegation in the plea that the defendant was the owner of the liquor sold before the passage of the act under which he was prosecuted, they say that the transcript fails to show that the admissions and averments of the plea were all the evidence in the case, and that other testimony may have shown that he did not so own and possess the liquor.

The case has been submitted to us on printed arguments. That on the part of the plaintiff in error has taken a very wide range, and is largely composed of the arguments, familiar to all, against the right of the states to regulate the traffic in intoxicating liquors. So far as this argument deals with the mere question of regulating this traffic, or even its total prohibition, as it may have been affected by anything in the federal Constitution prior to the recent amendments of that instrument, we do not propose to enter into a discussion. Up to that time it had been considered as falling within the police regulations of the state, left to their judgment, and subject to no other limitations than such as were imposed by the state constitution, or by the general principles supposed to limit all

legislative power. It has never been seriously contended that such laws raised any question growing out of the Constitution of the United States.

But the case before us is supposed by the counsel of plaintiff in error to present a violation of the fourteenth amendment of the Constitution, on the ground that the act of the Iowa legislature is a violation of the privileges and immunities of citizens of the United States, which that amendment declares shall not be abridged by the states; and that in his case it deprives him of his property without due process of law.

As regards both branches of this defence, it is to be observed that the statute of Iowa, which is complained of, was in existence long before the amendment of the federal Constitution, which is thus invoked to render it invalid. Whatever were the privileges and immunities of Mr. Bartemeyer, as they stood before that amendment, under the Iowa statute, they have certainly not been abridged by any action of the state legislature since that amendment became a part of the Constitution. And unless that amendment confers privileges and immunities which he did not previously possess, the argument fails. But the most liberal advocate of the rights conferred by that amendment have contended for nothing more than that the rights of the citizen previously existing, and dependent wholly on state laws for their recognition, are now placed under the protection of the federal government, and are secured by the federal Constitution. The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent state legislatures from regulating and even prohibiting the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property. A single case, that of *Wynehamer* v. *The People*, 3 Kernan's N. Y. Reports, 486, has held that as to such property the statute would be void for that reason. But no case has held that such a law was void as violating the privileges or immunities of citizens of a state or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States, and in this regard the case falls within the principles laid down by this court in the *Slaughter-house Cases*, 16 Wallace.

But if it were true, and it was fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey, at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then we concede that two very grave questions would arise, namely: First, whether this would be a statute depriving him of his property without due process of law; and, secondly, whether, if it were so, it would be so far a violation of the fourteenth amendment in that regard as would call for judicial action by this court?

Both of these questions, whenever they may be presented to us, are of an importance to require the most careful and serious consideration. They are not to be lightly treated, nor are we authorized to make any advances to meet them until we are required to do so by the duties of our position.

In the case before us, the supreme court of Iowa, whose judgment we are called on to review, did not consider it. They said that the record did not present it.

It is true the bill of exceptions, as it seems to us, does show that defendant's plea was all the evidence given, but this does not remove the difficulty in our minds. The plea states that defendant was the owner of the glass of liquor sold prior to the passage of the law under which the proceedings against him were instituted, being chapter sixty-four of the revision of 1860.

If this is to be treated as an allegation that defendant was the owner of that glass of liquor prior to 1860, it is insufficient, because the revision of the laws of Iowa of 1860 was not an enactment of new laws, but a revision of those previously enacted; and there has been in existence in the State of Iowa, ever since the Code of 1851, a law strictly prohibiting the sale of such liquors, — the act in all essential particulars under which defendant was prosecuted, amended in some immaterial points. If it is supposed that the averment is helped by the statement that he owned the liquor before the law was passed, the answer is that this is a mere conclusion of law. He should have stated when he became the owner of the liquor, or at least have fixed a date when he did own it, and leave the court to decide when the law took effect, and apply it to his case. But the plea itself is merely argumentative, and does not state the ownership as a fact, but says he is not guilty of any offence because of such fact.

If it be said that this manner of looking at the case is narrow and technical, we answer that the record affords to us on its face the strongest reason to believe that it has been prepared from the beginning for the purpose of obtaining the opinion of this court on important constitutional questions without the actual existence of the facts on which such questions can alone arise.

It is absurd to suppose that plaintiff, an ordinary retailer of drinks, could have proved, if required, that he had owned that particular glass of whiskey prior to the prohibitory liquor law of 1851.

The defendant, from his first appearance before the justice of the peace to his final argument in the supreme court, asserted in the record in various forms that the statute under which he was prosecuted was a violation of the Constitution of the United States. The act of the prosecuting attorney, under these circumstances, in going to trial without any replication or denial of the plea, which was intended manifestly to raise that question, but which carried on its face the strongest probability of its falsehood, satisfies us that a moot case was deliberately made up to raise the particular point when the real facts of the case would not have done so. As the supreme court of Iowa did not consider this question as raised by the record, and passed no opinion on it, we do not feel at liberty, under all the circumstances, to pass on it on this record.

The other errors assigned being found not to exist, the judgment of the supreme court of Iowa is affirmed.

SUPREME COURT OF CALIFORNIA.

[JANUARY TERM, 1874.]

MANDAMUS. — DEMURRER TO ANSWER. — THE FEDERAL CONSTITUTION SECURES TO ALL CHILDREN THE RIGHT TO ATTEND PUBLIC SCHOOLS. — SEPARATE SCHOOLS FOR COLORED CHILDREN. — RIGHT OF COLORED CHILDREN TO ATTEND SCHOOLS WITH WHITE CHILDREN.

WARD v. *FLOOD.*

Where, upon petition for the writ of mandamus, an answer is filed setting up certain affirmative matters in bar of the application, a motion made by the petitioner, that the writ issue, notwithstanding the matters set up in the answer, is, in effect, a general demurrer to the answer; and if the matters as pleaded in the answer be sufficient in law to bar or preclude the petitioner, the writ must be denied.

The latter clause of the first section of the fourteenth amendment to the federal Constitution — "nor shall any state . . . . . deny to any person within its jurisdiction the equal protection of the laws" — secures to each child in California, regardless of the race or color of such child, a legal right to attend as a pupil, and receive instruction at the public schools in the State, under the law providing for common schools.

The act of the legislature providing for the maintenance of separate schools for the education of children of African or Indian descent, and excluding them from schools where white children are educated, is not obnoxious to constitutional objection.

But unless such separate schools be actually maintained for the education of colored children, then the latter have a legal right to resort to schools where white children are instructed, and cannot be legally excluded therefrom by reason of race or color.

APPLICATION for a writ of mandamus.

John W. Dwinelle, for petitioner.

Williams & Thornton, *contra.*

Opinion by WALLACE, C. J.; CROCKETT, NILES, JJ., concurring.

This is an application made to this court for a writ of mandamus directing the defendant to receive the petitioner as a scholar in the school of which he is the principal. The petition for the writ is as follows: —

Harriet A. Ward, being sworn, says: "I am the mother of Mary Frances Ward, who is under the age of fourteen years — namely, of the age of between eleven and twelve years. I am the wife of A. J. Ward, and by that marriage the mother of said Mary Frances Ward. We are all of African descent, colored citizens of the United States and of the State of California, and at present, and continuously for thirteen years now last past, residents of the City and County of San Francisco, and for six months last past, and now, residing at No. 1006 Pacific Street, in the City and County of San Francisco. The City and County of San Francisco is not now, nor for the year last past has been, divided into school districts; but by law, and also by the custom adopted by the board of education of said city and county, pupils residing therein have a right to be received as such at the public school nearest their residence, in case

such school is not full, and they have made sufficient progress to be received therein.

"The nearest public school to our said residence in said city and county for six months now last past, and now, is the so-called Broadway Grammar School, on Broadway Street, in said city and county, between Powell and Mason streets; a public school under the control of the board of education of said city and county, sustained by taxes raised in said city and county for the support of public schools therein, and at the time the application hereinafter mentioned was made, was, and ever since then has been, and is now, in charge of Noah F. Flood, as principal thereof, appointed thereto by, and holding office as such, under the said board of education.

"On or about the 1st day of July, A. D. 1872, by the consent and direction of my said husband, I took the said Mary Frances Ward with me to the said Broadway Grammar School, the same being in session, and there found the said Noah F. Flood, then and there being such principal of said school, and then and there as such being the proper and only person to whom to make application for the admission of pupils to the same, and presented her to him, as a pupil asking to be admitted as such to said school. The said school then and there was not full, nor was there any good or lawful reason why the said Mary Frances Ward should not be received therein as such pupil, as aforesaid. But the said Noah F. Flood, instead of making inquiries respecting the said Mary Frances Ward, her residence, citizenship, or in any other respect, or examining her as to her proficiency, at once politely but firmly and definitely declined to entertain the said application, or to admit said Mary Frances Ward as such pupil, assigning, as the only reason for such action and refusal, the fact that she was a colored person, and that the said board of education had established and assigned separate schools for such colored persons, and that he was sorry to be compelled for that reason to adopt that course of action on his part. And I aver that the reason so assigned was true in fact, and was in truth and fact the only reason existing for such action and refusal of the said Noah F. Flood.

"The said Broadway Grammar School was then and is now of the description called a graded school, which signifies that the pupils in it are classified into several distinct grades, according to the instruction which they may respectively require; those of the lowest grade receiving instructions nearly of a primary character, and those of the highest grade receiving instruction of a somewhat thorough character in arithmetic, grammar, and other studies. The said Mary Frances Ward, at the time of said application, had already received sufficient instruction to enable her to enter the lowest grade of said grammar school, but not the highest grade.

"HARRIET A. WARD."

The answer of the defendant is as follows: —

"Now comes Noah F. Flood, and for his answer in the above entitled action or proceeding admits that he is and was, on or about the 1st day of July, 1872, the principal of the Broadway Grammar School, in the City and County of San Francisco; admits that Harriet A. Ward, in said action or proceeding mentioned, is the mother of Mary Frances Ward, a

minor under the age of fourteen years, and that she is the wife of A. J. Ward; admits that petitioner and her said mother and father are of African descent, and colored citizens of the United States, and admits their residence as stated in the affidavit of Harriet A. Ward in said action or proceeding; admits that the said City and County of San Francisco is not now, nor for the year last past has been, divided into school districts; and admits that by law and also by the custom adopted and established by the board of education of said city and county, white pupils residing therein have a right to be received as such at the public school nearest their residence in case such school is not full, and they have made sufficient progress to be received therein, but denies that children of African descent have a right to be admitted into any public school other than those separately organized and provided for them.

"Further answering, said defendant admits that the nearest public school to the residence of petitioner has been for six months last past, and now is, the said Broadway Grammar School; and admits that the same is a public school under the control of the board of education of said city and county, sustained by taxes raised in said city and county for the support of public schools therein, and was, on or about the said 1st day of July, 1872, and ever since has been, and now is, in charge of this defendant as principal thereof, appointed thereto by, and holding office as such under the said board of education.

"He admits that on or about the 1st day of July, 1872, the said Harriet A. Ward, by the consent and direction of her said husband, took the petitioner with her to the said Broadway Grammar School, and that the same was then in session; that said Harriet then and there presented the said petitioner to this defendant as a pupil asking to be admitted as such to said school, this defendant then and there being such principal as aforesaid; he admits that said school was not then and there full, but denies that there was no good or lawful reason why said petitioner should not be received in said school as said pupil as aforesaid, and denies that he had any right or authority to admit her as such pupil, or that she had any right to be admitted as such pupil, but on the contrary avers that there was a good and sufficient reason in this, that he was appointed as such principal by the said board of education, and in refusing to receive the petitioner as a pupil, he acted under and in accordance with the rules and regulations adopted and prescribed by the said board, one of which is as follows: —

SEPARATE SCHOOLS.

"'Sec. 117. SEPARATE SCHOOLS. — Children of African or Indian descent shall not be admitted into schools for white children, but separate schools shall be provided for them in accordance with the California School Law.'

"And this defendant avers that in accordance with said rule and the act of the legislature therein referred to, entitled 'An act to amend an act to provide for a system of common schools,' approved April 4th, 1870, two separate schools were and are provided for colored children, with able and efficient teachers, and which afford equal advantages, and are conducted under the same rules and regulations, as those provided for the education of white children.

"Further answering, defendant admits that the said Broadway Grammar School was then and is now of the description called a graded school, which signifies that the pupils in it are classified into distinct grades, according to the instruction which they may respectively require; but this defendant avers that the lowest grade in said grammar school then was and now is the sixth grade, into which the petitioner had not received sufficient instruction to enable her to enter; and further avers that the said Mary Frances Ward was, prior to and at the time of her said application, and now is, a member of and pupil in a school provided for colored children or children of African descent, under the said act of the legislature of the State of California, and in the seventh grade of said school.

"And this defendant further avers that the said Mary Frances, in applying for admission into the said Broadway Grammar School, did not present to him, as the principal thereof, any certificate of transfer, as required by the said rules and regulations as adopted by the said board of education, one of which rules is as follows: —

TRANSFERS.

"'Sec. 134. TRANSFERS. — Pupils desiring to be transferred from one school to another shall apply to their principal for a certificate, which shall state their name, age, scholarship, deportment, residence, and cause of transfer.'

"And now, having fully answered, the said defendant asks that the prayer of petitioner be denied, and that said defendant be hence dismissed, with judgment for his costs in this proceeding incurred."

The case was submitted for decision upon these pleadings of the respective parties.

1. The motion that the writ issue, notwithstanding the matters alleged in the answer of the defendant, amounts to a general demurrer to the answer. It necessarily assumes that the matters set up in the answer, though true in point of fact, do not in law amount to a defence against the application for the writ. It is averred in the petition and admitted in the answer that the Broadway Grammar School, into which the petitioner seeks to be admitted as a pupil, is a graded school — that is to say, a school in which the pupils are classified into several distinct grades, "according to the instruction which they may respectively require," and the answer thereupon avers "that the lowest grade in said Grammar School then was and now is the sixth grade, into which the petitioner had not received sufficient instruction to enable her to enter." It being, therefore, necessarily admitted for the purposes of this motion, that the attainments of the petitioner, in point of learning, were not sufficient to entitle her to be admitted in any class, even the lowest in the school, it would hardly require an argument to show that the defendant, as principal of the school, correctly denied her application to be received as a pupil. It is claimed for the petitioner, however, that the refusal of the defendant not having been placed on that ground, but on the sole ground that the petitioner was a *colored person*, the defendant cannot now be permitted to set up the fact that she was not sufficiently advanced in learning to entitle her to be admitted.

There is no doubt that if a party, upon tender or demand made, or

other proceeding *en pais*, had put his refusal upon some particular omission or defect in the proceedings of his adversary, he will not afterwards be permitted, in support of such refusal, to allege a new or additional defect or insufficiency in those proceedings, especially if such defect or insufficiency be of such a character as that it might have been cured if it had been pointed out or relied upon at the time. This is the ordinary and general rule, and it proceeds upon the idea that, having specially designated one or more supposed insufficiencies, the party thereby waives and abandons all others.

But it is obvious that this rule can have no just application to the case now under consideration. If the law, under the circumstances actually appearing in the record before us, forbade the respondent, as the principal of the school, to admit the petitioner as a pupil therein, the circumstance that the respondent put the refusal on an untenable ground ought not, in this proceeding, to preclude an examination into the very right of the case.

The claim of the petitioner to be admitted, and the corresponding duty of the defendant to admit her as a pupil, are governed by law; and if it appear, as it does unquestionably appear upon the record before us, that she did not possess the acquirements, in point of learning, sufficient to entitle her — whatever her color — to be admitted to any class in the school — even the lowest — then the respondent must be considered to have correctly refused to entertain her application for admission, and the legal efficiency of the particular reason assigned by him for such refusal becomes wholly immaterial.

The writ of mandamus is issued to compel the admission of a party to the enjoyment of a substantial right from which he is unlawfully precluded; and it is necessary that the record should manifest the right claimed, as well as the unlawful preclusion of the petitioner from the enjoyment of that right. Failing in either of these respects, the writ must be denied, for we know of no principle upon which we ought to compel the defendant to entertain the application of the petitioner here, when it appears to us by the record that, should he do so, it will then become his plain duty to again decline to admit her. Upon this view, the application for the writ must fail.

2. But we do not intend to put the decision of the case upon this point alone. We will, therefore, assume for this purpose, that the petitioner was sufficiently advanced in her studies to entitle her to enter some one of the classes of this school; and further, that upon her application for admission as a pupil she presented the certificate required by the 134th rule of the board, and also that the only ground upon which she was denied admission to the school was that she was a child of African descent. These assumptions lead us to inquire whether, under the circumstances appearing, the respondent is justified by law in refusing to admit her. We say under the circumstances appearing, because it is shown by the record that in San Francisco separate schools are not only authorized by law, but are in fact maintained for the education of colored children, "*with able and efficient teachers, and which afford equal advantages and are conducted under the same rules and regulations as those provided for the education of white children;*" and because it also appears that the petitioner, at the time when she made application to be admitted into the Broadway Grammar School,

was a pupil in attendance upon another public school conducted in San Francisco for the education of children of her color, which school, like the Broadway Grammar School, was a graded school, she being a pupil of the seventh grade or class therein. Recurring then to the inquiry whether the refusal of the respondent to admit the petitioner to the school under his charge is justified by the law, it will be seen that the statute of the State (Acts 1869–70, sec. 56) enacts in terms, that "the education of children of African descent and Indian children shall be provided for in separate schools," and if the statute be itself free from objection of a constitutional character, it is evidently a sufficient authority for the one hundred and seventeenth rule of the board already recited; and in this view the respondent was not only justified in excluding the petitioner from the school in his charge, but in the face of the statute and the rule referred to, he had no discretion to admit her as a pupil therein. It is not claimed by the learned counsel for the petitioner, as we understand him, that the statute in question is forbidden by the constitution of the State. The argument is that the exclusion of the petitioner from this particular school is contrary to the thirteenth and fourteenth amendments of the federal Constitution, lately adopted. We are, however, unable to perceive in what way it is to be maintained that the state law or the action of the respondent thereunder are in contravention of the thirteenth amendment referred to, by which amendment slavery and involuntary servitude are forbidden. It would seem, indeed, too plain to require argument, that the mere exclusion of the petitioner from this particular school does not assume to remit her to a condition of slavery or involuntary servitude, in the sense of the Constitution, or in any sense at all; or that there is any — even the slightest — relation between the case here and the prohibition contained in the amendment referred to.

Nor is it perceived that the state law in question, in obedience to which the respondent proceeded, is obnoxious to those provisions of the fourteenth amendment to the federal Constitution securing the privileges and immunities of citizens of the United States, and protecting all persons against deprivation of life, liberty, or property, without due process of law. That amendment so far as claimed to be material to the question is as follows: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It will indeed be readily conceded that the privilege accorded to the youth of the State by the law of the State, of attending the public schools maintained at the expense of the State, is not a privilege or immunity appertaining to a citizen of the United States *as such;* and it necessarily follows, therefore, that no person can lawfully demand admission as a pupil in any such school because of the *mere status of citizenship*, and it is perhaps hardly necessary to add, assuredly no person can be said to have been deprived of either life, liberty, or property, because denied the right to attend as a pupil at such schools, however obviously insufficient and untenable be the ground upon which the exclusion is put.

The last clause of so much of the amendment as has been recited, how-

ever, forbids the State to "deny to any person within its jurisdiction the equal protection of the laws;" and it remains to inquire if the statute of the State, providing for a system of common schools, in so far as it directs that schools shall be maintained for the education of colored children separate from those provided for the education of white children, be obnoxious to this portion of the federal Constitution.

The opportunity of instruction at public schools is afforded the youth of the State by the statute of the State, enacted in obedience to the special command of the constitution of the State, directing that the legislature shall provide for a system of common schools, by which a school shall be kept up and supported in each district at least three months in every year, &c. Art. 9, sect. 3. The advantage or benefit thereby vouchsafed to each child of attending a public school is, therefore, one derived and secured to it under the highest sanction of positive law. It is, therefore, a right — a *legal right* — as distinctively so as the vested right in property owned is a legal right, and as such it is protected, and entitled to be protected, by all the guarantees by which other legal rights are protected and secured to the possessor.

The clause of the fourteenth amendment referred to did not create any new or substantive legal right, or add to or enlarge the general classification of rights of persons or things existing in any state under the laws thereof. It, however, operated upon them as it found them already established, and it declared in substance that, such as they were in each state, they should be held and enjoyed alike by all persons within its jurisdiction. The *protection of law* is indeed inseparable from the assumed existence of a recognized legal right, through the vindication of which the protection is to operate. To declare, then, that each person within the jurisdiction of the State shall enjoy the equal protection of its laws is necessarily to declare that the measure of *legal rights* within the State shall be equal and uniform, and the same for all persons found therein — according to the respective condition of each — each child as all other children — each adult person as all other adult persons. Under the laws of California children or persons between the ages of five and twenty-one years are entitled to receive instruction at the public schools, and the education thus afforded them is a measure of the protection afforded by law to persons of that condition.

The education of youth is emphatically their protection. Ignorance, the lack of mental and moral culture in earlier life, is the recognized parent of vice and crime in after years. Thus it is the acknowledged duty of the parent or guardian, as part of the measure of protection which he owes to the child or ward, to afford him at least a reasonable opportunity for the improvement of his mind and the elevation of his moral condition, and of this duty the law took cognizance long before the now recognized interests of society and of the body politic in the education of its members had prompted its embarkation upon a general system of education of youth. So a ward in chancery, as being entitled to the protection of the court, was always entitled to be educated under its direction as constituting a most important part of that protection. The public law of the State — both the constitution and the statute — having established public schools for educationa. purposes, to be maintained by public authority and at public

expense, the youth of the State are thereby become *pro hac vice* the wards of the State, and, under the operations of the constitutional amendment referred to, equally entitled to be educated at the public expense. It would, therefore, not be competent to the legislature, while providing a system of education for the youth of the State, to exclude the petitioner and those of her race from its benefits, merely because of their African descent; and to have so excluded her would have been to deny to her the equal protection of the laws within the intent and meaning of the Constitution.

But we do not find in the act of April, 1870, providing for a system of common schools, which is substantially repeated in the Political Code now in force, any legislative attempt in this direction, nor do we discover that the statute is in any of its provisions obnoxious to objections of a constitutional character. In provides in substance that schools shall be kept open for the admission of white children, and that the education of children of African descent must be provided for in separate schools.

In short, the policy of separation of the races for educational purposes is adopted by the legislative department, and it is in this mere policy that the counsel for the petitioner professes to discern "an odious distinction of caste, founded on a deep-rooted prejudice in public opinion." But it is hardly necessary to remind counsel that we cannot deal here with such matters, and that our duties lie wholly within the much narrower range of determining whether this statute, in whatever motive it originated, denies to the petitioner, in a constitutional sense, the equal protection of the laws; and in the circumstance that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than of the other, and we see none of either; for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense. A question similar to this came before the supreme judicial court of the State of Massachusetts in 1849 (*Roberts* v. *the City of Boston*, 5 Cushing R. 198), and was determined by the court in accordance with the views just expressed by us. That was an action on the case brought by a colored child against the city to recover damages claimed by reason of her exclusion from a public school as a pupil. It appeared that primary schools to the number of about one hundred and sixty were maintained for the instruction of children of both sexes between five and seven years of age, and that of these schools two were appropriated to the exclusive instruction of colored children, and the residue to the exclusive instruction of white children. It also appeared that the plaintiff had been excluded from the primary school nearest her father's residence, which was a school devoted exclusively to the instruction of white children, and that the school appropriated to the education of colored children nearest her father's residence was about a fifth of a mile more distant therefrom than was the school from which she had been excluded. The constitution of the State of Massachusetts contained the following clauses, which were relied upon by the counsel for the plaintiff to show that the separation of colored from white children for educational purposes was not justified by law: "Part 1, article 1. All men are born free and equal, and have certain natural, essential, and inalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties, that of acquiring, possessing, and protecting property;

in fine that of seeking and obtaining their safety and happiness. Article 6. No man nor corporation or association of men have any other title to obtain advantages or particular and exclusive privileges distinct from those of the community than what arise from consideration of services rendered to the public." . . . .

It will be seen that the language of the Massachusetts constitution prohibiting "*particular and exclusive privileges*" was fully as significant, to say the least, in its bearings on the general question in hand as is that of the fourteenth amendment of the federal Constitution securing "the equal protection of the laws."

The argument of the counsel for the plaintiff in the Massachusetts case, much like that of the counsel for the petitioner here, was that the separation of the races for educational purposes "is the occasion of inconveniences to colored children, to which they would not be exposed if they had access to the nearest public schools; it inflicts upon them the stigma of caste; and although the matters taught in the two schools may be precisely the same, a school exclusively devoted to one class must differ essentially, in its spirit and character, from that public school known to the law, where all classes meet together in equality."

The opinion of the court, delivered by Mr. Chief Justice Shaw, maintained the rightful authority of the school committee to separate the colored children from the white children in the public schools of the city of Boston, and in the course of the opinion the learned chief justice remarked as follows: "It will be considered that this is a question of power, or of the legal authority of the committee intrusted by the city with this department of public instruction; because, if they have the legal authority, the expediency of exercising it in any particular way is exclusively with them. The great principle advanced by the learned and eloquent advocate of the plaintiff is, that by the constitution and laws of Massachusetts all persons, without distinction of age or sex, birth or color, origin or condition, are equal before the law. This, as a broad, general principle, such as ought to appear in a declaration of rights, is perfectly sound; it is not only expressed in terms, but pervades and animates the whole spirit of our Constitution of free government. But when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are equally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law, for their maintenance and security. What those rights are, to which individuals in the infinite variety of circumstances by which they are surrounded in society are entitled, must depend on laws adapted to their respective relations and conditions.

"Conceding, therefore, in the fullest manner, that colored persons, the descendants of Africans, are entitled by law, in this Commonwealth, to equal rights, constitutional and political, civil and social, the question then arises whether the regulation in question, which provides separate schools for colored children, is a violation of any of these rights.

"Legal rights must, after all, depend upon the provisions of law; cer-

tainly all those rights of individuals which can be asserted and maintained in any judicial tribunal. The proper province of a declaration of rights and constitution of government, after directing its form, regulating its organization, and the distribution of its powers, is to declare great principles and fundamental truths, to influence and direct the judgment and conscience of legislators in making laws, rather than to limit and control them, by directing what precise laws they shall make. The provision that it shall be the duty of legislatures and magistrates to cherish the interests of literature and the sciences, especially the University of Cambridge, public schools and grammar schools in the towns, is precisely of this character. Had the legislature failed to comply with this injunction, and neglected to provide public schools in the towns, or should they so far fail in their duty as to repeal all laws on the subject, and leave all education to depend on private means, strong and explicit as the direction of the Constitution is, it would afford no remedy or redress to the thousands of the rising generation, who now depend on these schools to afford them a most valuable education and an introduction to useful life. . . . . The power of general superintendence vests a plenary authority in the committee to arrange, classify, and distribute pupils, in such a manner as they think best adapted to their general proficiency and welfare. If it is thought expedient to provide for very young children, it may be that such schools may be kept exclusively by female teachers, quite adequate to their instruction, and yet, whose services may be obtained at a cost much lower than that of more highly qualified male instructors. So, if they should judge it expedient to have a grade of schools for children from seven to ten, and another for those from ten to fourteen, it would seem to be within their authority to establish such schools. So, to separate male and female pupils into different schools. It has been found necessary, that is to say, highly expedient, at times, to establish special schools for poor and neglected children, who have passed the age of seven and have become too old to attend the primary school, and yet have not acquired the rudiments of learning to enable them to enter the ordinary schools. If a class of youth, of one or both sexes, is found in that condition, and it is expedient to organize them into a separate school, to receive the special training adapted to their condition, it seems to be within the power of the superintending committee to provide for the organization of such special school. . . . . In the absence of special legislation on the subject, the law has vested the power in the committee to regulate the system of distribution and classification; and when this power is reasonably exercised, without being abused or perverted by colorable pretences, the decision of the committee must be deemed conclusive. The committee, apparently upon great deliberation, have come to the conclusion that the good of both classes of schools will be best promoted by maintaining the separate primary schools for colored and for white children, and we can perceive no ground to doubt that this is the honest result of their experience and judgment. It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded on a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and

feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence, and we cannot say that their decision upon it is not founded upon just grounds of reason and experience, and is the result of a discriminating and honest judgment."

We concur in these views, and they are decisive of the present controversy. In order to prevent possible misapprehension, however, we think proper to add that in our opinion, and as the result of the views here announced, the exclusion of colored children from schools where white children attend as pupils cannot be supported except under the conditions appearing in the present case, — that is, except where separate schools are actually maintained for the education of colored children; and that unless such separate schools be in fact maintained, all children of the school district, whether white or colored, have an equal right to become pupils at any common school organized under the laws of the State, and have a right to registration and admission as pupils in the order of their registration, pursuant to the provisions of subdivision 14, of section 1617, of the Political Code. *Writ of mandamus denied.*

McKINSTRY, J. I concur in the judgment on the ground first considered in the opinion of the chief justice.

February 24.

CIRCUIT COURT OF THE UNITED STATES. — NINTH JUDICIAL CIRCUIT, DISTRICT OF CALIFORNIA.

[MARCH, 1874.]

PATENT: USE OF PART OF COMBINATION. — USELESS PARTS REJECTED.

C. C. COOLEDGE v. *JOHN McCONE.*

A combination of three distinct parts is not infringed by the making and sale of two of the parts to be used without the third.

When the invention claimed and patented is a combination of three distinct parts, it is no infringement to make and use two of the parts, even though the third is useless.

BEFORE Sawyer and Hillyer, JJ.

The plaintiff is assignee of a patent issued to one Belknap, for a combination of certain shoes and dies, and bevelled bars, used in amalgamating pans for the amalgamation of silver ores. The defendant, a foundryman, is charged with making and selling the invention in violation of plaintiff's rights. It appeared in the testimony that some time in 1866, before the assignment under which plaintiff claims, the patentee, Belknap, brought the patterns of his shoes and dies to defendant's foundry, and

procured him to cast shoes and dies from those patterns, which the patentee himself put into the pans of certain mills in the neighborhood without charge, for the purpose of introducing them. But the defendant made no "bevelled bars," to go with the shoes and dies. These could be made of wood as well as of iron, and Belknap himself made the bevelled bars for those mills wherein he had introduced his invention — the defendant casting from the patterns furnished only the shoes and dies. Afterwards, between 1867 and the commencement of this suit, and after the assignment of Belknap's patent to plaintiff, the defendant cast and furnished to various mill-owners shoes and dies of the same kind. Mill-owners would bring to defendant their own patterns in such form as they desired the castings to be made, and the defendant would cast the shoes and dies from the patterns so furnished, and the parties for whom they were cast would take them away, put them into the pans in their mills themselves, and there use them. They sometimes obtained dies without the shoes, and used them with other kinds of shoes; and sometimes obtained shoes without the dies, and used them with other kinds of dies. The shoes and dies were *not necessarily* used together; as the Belknap shoe *could be*, and sometimes *was*, used with other kinds of dies, and the Belknap die with other shoes. Defendant never inquired what use was to be made of the shoes and dies cast by him, but he simply cast and furnished them from patterns brought by his customers. There was no testimony tending to show that he ever cast or furnished any of the "bevelled bars," either with or without the shoes and dies. On the contrary, the testimony showed affirmatively that he never did cast or furnish any bevelled bars. There was, also, no testimony tending to show that the parties using the shoes and dies cast and furnished by defendant ever procured from other sources, or used in connection with the shoes and dies furnished by him, any of the "bevelled bars" mentioned in the plaintiff's patent, or any mechanical substitute therefor, except in those instances where the patentee himself furnished them as aforesaid, in his efforts to introduce his invention. The casting and furnishing of shoes and dies as before stated to parties, other than Belknap, are the acts complained of as constituting an infringement of plaintiff's rights.

At the close of plaintiff's testimony, counsel for the defendant moved the court to advise the jury to find a verdict for the defendant, on the ground, that there was no testimony tending to show that the defendant had manufactured or sold the plaintiff's invention, — the invention claimed and patented being, as defendant insisted, a combination of shoes, dies, and the "bevelled bars;" and as the "bevelled bars" had not been made or sold, or even used in connection with the shoes and dies furnished by defendant, the whole combination had not been made or sold; and that there is no infringement by making and using a part only of the combination.

After argument of the motion, and consultation between the judges,

SAWYER, Circuit Judge, delivered the opinion of the court as follows: —

We have examined the specifications annexed to the patent very carefully, and it is very plain to our minds, that the patent is for a combination of several elements, or parts. The petitioner commences by describing the drawings, and then states as follows: —

"The nature of my invention consists in the arranging of shoes and dies having grooves or channels, cut obliquely from the circumference to the centre, terminating in a line of a radius to the centre or axis. My invention also relates to bevelled bars placed between each die, and partially filling the grooves, for the purpose of keeping the ore near the same as they pass each other." Then he describes how the dies are fixed to the disks, and tells us how other dies have been used in a different arrangement; points out how the bevelled bars are arranged in connection with the other parts; describes their operation, and concludes with the claim, which is in the following words: —

"I do not claim broadly the use of shoes and dies for the purpose of reducing amalgamating ores, for these are well known and used. What I do claim, however, and desire to secure by letters patent, is, constructing and placing the shoes and dies upon upper and nether disks obliquely at about the angle as described, together with the bevelled bars B. B. B., &c.; substantially as described, and for the purposes set forth."

The claim is for a combination. There is no claim that the dies are new; that the direction of the grooves is new, or that the bars are new. But what he does claim is the arrangement of these together.

"Placing the shoes on upper and nether disks about the angles described, *together with* the bevelled bars B. B. B., substantially as described, and for the purposes set forth." These shoes and dies, arranged as described, "together with;" that is to say, united with, in conjunction with, in combination with the bevelled bars, substantially as described. Now, it may be that this claim is not made in such a way as to be so advantageous to the patentee, as he was entitled to make it. It may be that he has arranged his dies in connection with the disks in such a way as to be an improvement by itself, and which may entitle him to a patent for that arrangement, unconnected with the bevelled bars; and that he might have put in a claim and obtained a patent for such arrangement, independent of the bevelled bars. It may be that, having obtained a patent for such arrangement, he could, also, have obtained a patent for a further combination of that arrangement in connection with the bevelled bars. If that was the object intended to be covered by this patent, the claimant has failed to express it. It is for the arrangement of the dies and shoes together with, that is to say, *in combination with*, the bars that is patented. The claim to the whole is made as one indivisible claim — as an entirety — and the entire combination must be made and sold or used, in order to constitute an infringement. If the patentee failed to get all he desires; or failed to get his patent in such a form that any part could not be used without an infringement, he has only done what, perhaps, a majority of patentees before him in the first instance have done. It may be necessary to surrender the patent, and procure a reissue in order to secure the full benefit of his invention. However this may be, he has made his claim in his own way, and the patent on that claim is, for this one, single, indivisible combination of all the elements as an entirety, in manner substantially as described, and for the purposes indicated; that is to say, to cut the pulp like shears, and throw it up to the cutters by means of the bars.

The charge in this complaint is, that the defendant has made and sold

this invention as one single invention. The testimony shows that the defendant has manufactured and furnished to mill-owners dies, and manufactured and furnished shoes. One witness testifies that the defendant put the dies and shoes together, in some instances in the shops, for the purpose of trying them, to see if they would fit; but there is no testimony which shows that he has ever manufactured any of these "bevelled bars." On the contrary, Tyrrell and Horn, his employés, and Belknap, say distinctly that defendant never manufactured any of the bars so far as they are aware; but he has manufactured shoes and dies upon the request of parties desiring to have them manufactured. There is no testimony showing that defendant ever manufactured or sold the bevelled bars.

The testimony shows, too, that these dies *may be*, and *sometimes are*, used *in connection with other shoes*, and *the shoes in connection with other dies*. They are not necessarily used together in the combination.

It is claimed that the defendant has made the shoes and dies without authority from the patentee, knowing they were to be used in violation of the patent, and that this renders him liable even if he did not make the entire machine. Now, if several different parties conspire together, one to make one part of a patented machine, another another, and so on, in order to avoid responsibility, it may well be that each party so conspiring and engaged in making a complete machine would, nevertheless, be liable, — although he himself should actually make but one part of the perfected machine. However that may be, it is not this case. There is no testimony tending to establish such a case. Defendant casts certain parts for customers from patterns furnished by them, without inquiry as to their use. The pieces or elements of this combination are not new, and are capable of use out of this combination. Defendant had a right to cast and sell them to be used separately; and there is no testimony showing either that the bevelled bars, or any mechanical substitute for them, were used in connection with any of the dies and shoes which defendant made without authority from Belknap; or that defendant understood that they were to be so used. Belknap, I believe, does say that bars were made by himself to use in combination with those dies and shoes which he ordered made by defendant for the purpose of introducing his invention; but, beyond that, there is no testimony tending to show that any of the parties made and used the bevelled bars in connection with any of the dies and shoes which defendant made without authority from the plaintiff.

We have looked over the testimony carefully. My associate, Judge Hillyer, took very full notes, and I find that they agree with my recollection of the testimony. There is nothing, then, to show that this combination was made or sold by the defendant, or that he has made portions of it and sold them to other parties, with the knowledge that they were to be used in connection with the "bevelled bars," for the purpose of making up a single complete machine.

We think, therefore, we are bound to advise the jury as asked.

At the close of the opinion, the counsel for plaintiff offered to prove further, that the "bevelled bars" were, in fact, of no advantage, or use in the combination, and might be dispensed with in practice without in any degree impairing the efficiency of the machine; that the whole advan-

tage of the machine really consisted in the arrangement of the shoes and dies obliquely, in connection with the disks, as in the other particulars described in the specifications, so as to cut outwards in the manner of shears. But the court held that the whole combination, as an entirety, is the thing claimed as the invention and patented; and that no part, however useless, can be dispensed with, for the purpose of working out an infringement. Citing *Rich* v. *Close*, 4 Fisher's Pat. Ca. 282; *Vance* v. *Campbell*, 1 Black, 427; and *Eamers* v. *Godfrey*, 1 Wal. 78; *Carter* v. *Baker*, 1 Saw. 512.

The court thereupon advised the jury to return a verdict for the defendant, which was accordingly done.

Lewis & Deal and *Beatty*, for plaintiff.

Williams & Bixler, for defendants.

CIRCUIT COURT OF THE UNITED STATES.—NINTH JUDICIAL CIRCUIT, DISTRICT OF CALIFORNIA.

[FEBRUARY, 1874.]

PAID JUDGMENT.—SALE.—ASSIGNEE OF PAID JUDGMENT.—POWER OF ATTORNEY.—INCIDENTAL POWERS.—ACTIONS AGAINST BELLIGERENTS.

RICHARD B. LEE v. *DANIEL ROGERS, administrator, et al.*

1. *A sale of lands under an execution issued upon a judgment which had been fully paid is void.*
2. *W. had a judgment against C., which was the first lien on his property. T. also had a judgment, which was the second lien on the property. C. paid W.'s judgment in full, but took an assignment of it in the name of his hired man, who paid nothing for it. Afterwards, to avoid an attachment, C. confessed a judgment in favor of L., for a debt previously due him, which became a lien upon the property, and, in order to give L. a preference over T., C. procured an assignment to him of W.'s judgment, for which no additional consideration was paid; but L. was not aware that it had been paid. C. afterwards confessed a judgment in favor of F., which also became a lien on the property. L. afterwards sold the lands on W.'s judgment and became the purchaser. Afterwards F. became purchaser of the same lands under his own judgment. Held:* 1. *That as to F., L. was not a bonâ fide assignee of W.'s judgment for a valuable consideration; and that his sale was void.* 2. *That by his purchase F. acquired the title to the land.*
3. *L. executed a power of attorney to H., authorizing him to collect his said judgments against C., by sales under execution, &c., to receive the money thereon, "arbitrate or compound" the same, and for that purpose to employ counsel. After the aforesaid sales, F. brought an action against L. to annul the said sales and conveyances to L., as clouds on his, F.'s title. H. consulted counsel who advised him that the said sales under W.'s judgment after payment were void, and L.'s title invalid. Held, that as incident to the powers expressly given to collect said judgment, arbitrate and compound the same, in connection with subsequent instructions from L., by letter, H. had power to authorize counsel to appear in*

said action and consent to a judgment annulling said sales upon terms that enabled him to realize the amount due to L. on his judgment.

4. *The existence of war does not prevent the citizens of one belligerent power from taking proceedings for the protection of their own property in their own courts, against the citizens of the other, whenever the latter can be reached by process.*

SAWYER, Circuit Judge. Bill in equity, wherein complainant seeks to establish a trust in his favor as to certain lands situate in the city of Oakland, held and claimed by the defendants. The pleadings and evidence appear to me to establish the following facts. In the years 1858 and 1859, Andrew J. Coffee was the owner of the lands in question. He had become embarrassed. Some time in 1856 the agent of the complainant loaned the sum of six thousand dollars of the latter's money on a note signed by one Green, and indorsed by said Coffee. It is not clear, and not material, whether this money was borrowed for the benefit of Coffee, or of Green, or their joint benefit. On September 23, 1858, Joanna Wheelock obtained a judgment in the Twelfth Judical District against A. P. Green, L. Ransom, and said Coffee, for $3,519.92, and costs, which became a lien upon the property in question. Messrs. Haggin and Tevis obtained a judgment against Coffee and Green for some $12,000, which also became a subsequent lien upon the property.

The Haggin and Tevis judgment at the time stood in such position that Coffee claimed that he was discharged, and he had an action pending to procure his own exoneration. In October, 1858, said Coffee borrowed of J. A. Freanor something over $2,000, for the purpose of paying, in part, the said Wheelock judgment, and with the money so borrowed, and other money obtained from other sources, he paid the Wheelock judgment in full; but instead of having the judgment satisfied of record, said Coffee procured an assignment of said judgment to be made to one Lester, a hired man of said Coffee. Said Lester paid nothing for said assignment. On January 1, 1859, Coffee executed to Freanor a promissory note for $700, — being the balance then due him on said sum borrowed as aforesaid, all said sum except said balance having been paid before that date.

In May, 1859, the complainant, becoming uneasy about his money, determined to secure it, and for that purpose directed his attorney, Colonel Crockett, to commence suit by attachment; and the papers for an attachment were accordingly prepared. Before commencing the suit complainant notified said Coffee of his purpose, and thereupon Coffee requested him not to attach. Coffee told complainant that he controlled the Wheelock judgment; that it was the first lien on his property, being prior to the Haggin and Tevis judgment, which was at that time the only other lien; that he would procure the Wheelock judgment to be assigned to complainant; and would, also, confess a judgment in complainant's favor for the amount due him. Upon consultation with his counsel, this proposition was accepted by complainant. On the next day, May 19th, 1859, Coffee brought him an assignment of the Wheelock judgment in due form; Colonel Crockett drew up the papers for a confession of judgment, which were signed and delivered, and complainant went to the clerk's office in Alameda County, and had his judgment duly entered.

Complainant paid no further consideration for the assignment of the

Wheelock judgment. It was taken only as an additional security for the preëxisting indebtedness; and, probably, with the design that it should take precedence over the Haggin and Tevis judgment, in case Coffee should not get rid of it in the suit pending for that purpose. Upon thus securing complainant, Coffee understood that he was to have further indulgence. Immediately after these transactions, on May 21, 1859, Coffee confessed a judgment to Freanor for the amount of said $700 dollar note, interest and costs, which, also, became a lien on said property.

Soon afterwards Coffee went to the Eastern States, and was absent till some time in the fall. Soon after Coffee's departure, on June 9, 1859, said complainant caused an execution to be issued on the said Wheelock judgment, and upon said execution had a large portion of the lands in controversy sold on July 1, 1859, himself becoming the purchaser at the sum of $2,950. On or about July 5, 1859, the complainant left for the Eastern States, leaving instructions with his attorney in fact, Jno. W. Haynes, to make further sales. In pursuance of said instructions, another execution was issued on said Wheelock judgment on July 13, 1859, under which the remaining lands in controversy were sold on August 1, 1859, and bid off by said Haynes, in the name and for the benefit of the complainant, for the sum of $1,585, which two sales satisfied the Wheelock judgment. No redemption having been made, the sheriff executed deeds of conveyance in due form in pursuance of said sales, April 16th, 1860. Subsequently other property was sold upon complainant's own judgment, from which some $4,000 were realized and applied on the judgment. Complainant went to Washington, where he remained till the war of rebellion broke out, when he resigned his commission in the United States army, went to the States in rebellion, accepted a commission in the rebel army, and continued in the service within the rebel lines till the close of the war.

Said Freanor being aware that the Wheelock judgment had been satisfied before its assignment to complainant, in part with money borrowed from him for that purpose, and for a part of which his judgment had been obtained, had an execution issued on his own said judgment, April 25, 1861, and the same property purchased under the Wheelock judgment sold thereunder on May 20, 1861, before the expiration of his lien, himself becoming the purchaser. No redemption having been made, the sheriff executed a deed in due form in pursuance of said sale, December 28, 1861.

Afterwards on May 13, 1862, said Freanor filed his bill of complaint in the district court of the Third Judicial District against said Lee, complainant in this action, in which he set out substantially the facts herein stated; claimed a valid title to said lands in controversy, under his judgment and sale; alleged that complainant's deeds, although void, were regular on their face and constituted a cloud on his title; and prayed a decree that the said Wheelock judgment had been satisfied before said transfer and sales thereunder, and that said sales and deeds given in pursuance thereof be annulled and adjudged to be void.

At the date of the filing of said bill of complaint of Freanor, defendant, J. W. Haynes, was the attorney in fact of the complainant, having charge of complainant's business in California. Said complainant at the time was

within the rebel lines, and for that reason no communication could be had between him and his attorney, and none was had for a long time afterwards. Mr. Haynes was, therefore, compelled to act upon his own judgment respecting the action. Under the statutes of California, service could be obtained upon absent defendants by publication of summons. When the filing of this bill of complaint came to the knowledge of Haynes, he consulted with his own attorney, Mr. Rogers, and the former attorney and personal friend of complainant, Colonel Crockett, and both advised him that if the facts alleged could be established, the sales on the Wheelock judgment, and the deeds thereunder, would be set aside as void. Upon an investigation of the facts, both Mr. Haynes and his counsel became satisfied that the Wheelock judgment had been fully paid before its assignment to complainant, and that the sales thereunder were void. Colonel Coffee now entered upon negotiations between Freanor and Haynes, which resulted in an arrangement between the parties by which it was agreed that Colonel Crockett, upon special authority from Haynes, as the attorney in fact of the complainant, should enter the latter's appearance in Freanor's action, and consent to a decree in pursuance of the prayer of the bill of complaint annulling the sales and deeds under the Wheelock judgment; that Thomas J. Haynes should pay the principal, interest, cost, and attorney's fees on Freanor's judgment against Coffee; that Freanor should convey the lands in controversy to said Thomas J. Haynes, and that said Thomas J. Haynes should sell the lands, and out of the proceeds repay: firstly, the said sum paid to Freanor; secondly, the amount, principal and interest due from said Coffee to complainant on the judgment confessed to him; and, after paying these demands, any surplus should go to Coffee's other creditors. This appears to be the arrangement entered into between Freanor, Coffee, and Haynes. Freanor's object, after securing his own demands, was to favor Coffee, and he would enter into no arrangement that did not give to Coffee the benefit of any surplus. Colonel Crockett, however, who was consulted upon the law points, does not appear to have understood that the residue was to go to Coffee, but that the land was to be held for the benefit of complainant. But the others who made the agreement agreed as stated. With the exception of this part of the arrangement, which Colonel Crockett does not appear to have understood, or if understood, had forgotten during the many years which had elapsed, the settlement had his approbation, as being the best thing that could be done under the circumstances; as it secured to complainant the whole amount due him, whereas, if Freanor should succeed in his suit, complainant was liable to lose all. In pursuance of the said arrangement between Coffee, Freanor, and Haynes, J. W. Haynes executed an instrument authorizing Colonel Crockett to appear, in the words following: —

"*In the District Court of the Third Judicial District, in and for the County of Alameda.*

"JOHN A. FREANOR *v.* RICHARD B. LEE.

"I do hereby authorize J. B. Crockett, as my attorney, to appear on my behalf to the above entitled action and to file an answer therein, con-

senting that a decree be rendered in said cause, in accordance with the prayer of the complaint.

"San Francisco, 30 *July*, 1862.

"R. B. Lee.

"By Jno. W. Haynes, *his attorney in fact.*"

Colonel Crockett, in pursuance of said authority, filed the following answer, viz.: —

"*In the District Court of the Third Judicial District, in and for the County of Alameda.*

"John A. Freanor *v.* Richard B. Lee.

"The defendant, Richard B. Lee, by his attorney, comes and for answer to the complaint says he denies all imputations of fraud or fraudulent conduct contained therein, but admits the other allegations in said complaint contained, and does not deny the plaintiff's right to the relief demanded, and consents that a decree be entered in accordance with the prayer of the complaint, and that said decree be entered at the present term of the court.

"J. B. Crockett, *Attorney for defendant.*"

And thereupon a decree was entered adjudging said sales and deeds under the Wheelock judgment void. In further pursuance of said agreement, Thomas J. Haynes paid to Freanor some $1,472, the amount due him, and Freanor conveyed the lands to said Haynes. Soon after said conveyance, Coffee, as broker for Haynes, commenced negotiating sales, and through him the said lands were from time to time all sold in various parcels, and to various purchasers, and, out of the proceeds, the said sum advanced by Haynes to Freanor was first paid; then the amount due from Coffee to complainant, after which the balance went to Coffee's other creditors. At the time of said agreement between Coffee, Freanor, and Haynes, there were funds of complainant under the control of Haynes to an amount greater than the sum paid to Freanor, but they were at the time otherwise invested, and were not then available for that purpose; and Haynes advanced the same out of his own funds.

Thomas J. Haynes was really expected by the complainant to act as his attorney in fact. He had before been in complainant's employ, and for a long time previous to this transaction, his confidential friend as well as agent. But Thomas J. Haynes went East at the same time with complainant, and, for this reason, the power of attorney was given to his brother, John W. Haynes, although it was understood and intended that he should act under the supervision and advice of Thomas J. Haynes when the latter should return, or, rather, that Thomas J. Haynes should, in fact, be the active agent. The power of attorney under which John W. Haynes acted was executed by complainant on the day he left, July 5, 1859. It contained no express power to sell land, or otherwise dispose of it, except to lease, but it authorizes him to demand and receive all moneys, goods, wares and merchandise, debts, choses in action, &c., and to sue therefor, and to employ counsel to represent him in court "for that purpose;" "to submit to arbitration or compound the same," and "to prosecute through final process any and all judgments to me belong-

ing, and at the sales under execution issued thereon, to become a purchaser in my name of any lands," &c., receive the money thereon, and any redemption money, &c. This is the only formal technical power of attorney held by Haynes. But before the war broke out, and while complainant was still in Washington, creditors of Coffee in California had expressed the opinion that the said sales were void, and a design to attack them. These facts coming to the knowledge of Thomas J. Haynes, on February 20, 1861, he informed complainant by letter of the threats made, and the grounds upon which the sales were claimed to be void. And he particularly refers to Freanor by name as one creditor, who claims the Wheelock judgment to have been satisfied with the money loaned by himself. Also, in a letter dated March 10, 1861, he informs complainant that he has submitted the case to his counsel, Mr. Rogers, who advised him, that "in his opinion, if the creditors assailing those titles can satisfactorily prove the fact of the judgment having once before been paid, then the sheriff's sale would be set aside by the court," and, he adds, among other things, "I am satisfied that an attempt will be made as stated in my letter of 20th ult." In answer to Haynes's said letter of February 20, the complainant writes from Washington to Thomas J. Haynes a letter, under date of March 20, 1861, in which he animadverts upon the charges of fraud, &c., made by Coffee's creditors in relation to the Wheelock judgment, and, among other things, says: "As to my Oakland property, *you must be governed by your own judgment* as to its management, *and should it be necessary to go to law, employ whom you think best.*" Under date of April 6, 1861, complainant again writes in answer to Haynes's letter of March 10, wherein he refers to it as "inclosing the opinion of Mr. Rogers," and after sundry suggestions about the Wheelock judgment, he says: "As to the clause in my letter of August 22d, 1860, you must, *as in all cases connected with my Oakland property, be governed by your own judgment, and such legal advice as you may deem expedient.*" The complainant himself testifies that Thomas J. Haynes, while East, was a guest at complainant's house in Washington; that a short time before Haynes's return to California, complainant had been informed that Colonel Coffee had said his title under the Wheelock judgment might be assailed; that the matter was *fully discussed* between him and Haynes, and that "I [complainant] charged Thomas J. Haynes upon his return to California, if any such attempt was made, *to call upon and advise with Colonel Crockett as to the* necessary steps in the defence of my title."

Complainant further testifies, on the subject of authority of the Haynes brothers to employ counsel on his behalf: "I mean to say, I did not specifically authorize an appearance in *that particular action, not knowing of the existence of any such action.*" But he says: "He (John W. Haynes) was authorized, to the extent given in my power of attorney to him, and *both himself* and *his brother, Thomas J. Haynes, were enjoined verbally*, and *probably subsequently in writing* — of which I have no recollection — *to employ Colonel Crockett as my lawyer in all cases touching my interests, if his services could be rendered available;* if not, then to employ other counsel," and this is substantially repeated several times.

During the war there was no communication between complainant and his agents here, the Haynes brothers, and he was not advised of the trans-

actions relating to the property in question, which occurred subsequently to the breaking out of the war, until some time after its termination. After the war closed, Haynes remitted to him the balance of Coffee's indebtedness, which was received by complainant before he was informed of the said transactions. According to Coffee's testimony, which is not contradicted, there was paid to complainant, and his agents for him, by Coffee, and out of his property on said $6,000 loan, in all, the sum of seventeen thousand three hundred and fifty dollars.

There are about one hundred defendants in this action who are purchasers for a valuable consideration of various parcels of the land in controversy from Haynes and his grantees, deriving title through said conveyance from Freanor to Thomas J. Haynes. Many, if not all of them, have put extensive and valuable improvements on the lands thus purchased.

The complainant seeks to have the judgment in the case of Freanor adjudged void, on the ground of fraud; and also on the grounds of want of power in Haynes to authorize an appearance, or of Colonel Crockett to appear and consent to the said judgment, and that the several defendants holding under the conveyance from Freanor be adjudged to hold their title in trust for complainant, and that they be decreed to convey to him; also prayer for an account as against Haynes and Coffee, &c.

The complainant claims: 1. That by his sales and conveyances under the Wheelock judgment he took a valid title to the lands. 2. That Haynes had no power as his attorney in fact to authorize Colonel Crockett to appear, and that Colonel Crockett had no authority to appear in Freanor's suit and consent to the decree entered therein annulling said sales and conveyances under the Wheelock judgment, and that said proceedings are void. 3. That said arrangement between Freanor, Haynes, and Coffee, by which said sales and conveyances were annulled, and said lands conveyed by Freanor to Thomas J. Haynes, and afterwards sold and the proceeds appropriated as herein before stated, was made with the intent to defraud complainant, and, consequently, void. 4. That Colonel Crockett's appearance in the action of *Freanor* v. *Lee* having referred to the written authority given by Haynes as his attorney in fact for complainant, which written authority was also made a part of the record, purchasers had record notice as to the same, and were bound to ascertain the powers of Haynes; that they are chargeable through the record with notice of the defect in their title, and stand in no better position than Thomas J. Haynes from whom they derive title. 5. That Haynes having obtained the apparent title through a fraudulent arrangement with Freanor and Coffee, his vendees, even though *bonâ fide* purchasers, could obtain no better title than he himself had. 6. That the said arrangement for vacating the said sales under the Wheelock judgment, being with an alien enemy, and, as is charged by the complainant, for the purpose of avoiding confiscation of his property, are void. 7. That no action could be legally prosecuted in the courts of the State against an alien enemy while actually absent within the enemy's lines engaged in the war.

It is settled, without any authority, so far as I am aware, to the contrary, that a sale under a judgment after its full payment is absolutely void. And a number of the authorities go so far as to say that such a

sale is void under all circumstances, and as to all persons, even though purchasers in good faith for a valuable consideration, and without notice. The principle stated in the authorities is, that the judgment is the sole foundation of the sheriff's power to sell and convey; that, if the judgment has been paid at the time of the sale, the sheriff's power is at an end, and he acts without authority; and that the purchaser under a power is chargeable with notice if the power does not exist, and purchases at his peril. The following are the principal authorities upon the point: *Hammatt* v. *Wyman*, 9 Mass. 138; *King* v. *Goodwin*, 16 Mass. 63; *Wood* v. *Colvin*, 2 Hill, 568; *Carpenter* v. *Stilwell*, 11 N. Y. 69, 70, 76; *Swan* v. *Saddlemire*, 8 Wend. 681; *Lewis* v. *Palmer*, 6 Wend. 368; *Craft* v. *Merrill*, 14 N. Y. 461; *Neilson* v. *Neilson*, 5 Barb. 565–9; *Cameron* v. *Irwin*, 5 Hill, 275; *Delaplaine* v. *Hitchcock*, 6 Hill, 17; *Deyo* v. *Van Valkenburg*, 5 Hill, 246; *Sherman* v. *Boyce*, 15 John. 443; *Jackson* v. *Anderson*, 4 Wend. 480; *Mouchat* v. *Brown*, 3 Rich. 117; *Hunter* v. *Stevenson*, 1 Hill (*S. C.*), 415; *State* v. *Salyers*, 19 Ind. 432; *Skinner* v. *Lehman's Heirs*, 6 Ohio, 430. Tax sales after payment of the taxes have often been held to be void even as to innocent purchasers, upon the same principles. *Jackson* v. *Morse*, 18 John. 441; *Curry* v. *Hinman*, 11 Ill. 420; *Hunter* v. *Cochran*, 3 Barr, 105; *Dougherty* v. *Dickey*, 4 Watts & Serg. 146; *Blight* v. *Banks*, 6 Mon. 206.

The Wheelock judgment having been fully paid before its assignment to complainant, and before any sale under it, there can be no doubt that the sale was void. There was no vitality in the execution issued by complainant's direction, and there was no power in the sheriff to sell. This is the legal aspect of the case. But complainant's counsel insists, that at the time of the assignment of the judgment, Coffee led complainant to believe that the judgment was still unsatisfied, and that, conceding the sales to be void at law, he, and those claiming under him, are in equity estopped from alleging the prior payment of the judgment, and the invalidity of the sales under it. Whatever the equitable rights of the parties might be, if the question had arisen between complainant and Coffee alone, I am unable to take that view of the case, as it is now presented. Immediately after the assignment of the Wheelock judgment, and the confession of judgment in favor of complainant, Coffee confessed another judgment in favor of Freanor, which at once became a lien upon the land, subject only to the rights of complainant then vested — the prior lien of complainant's own judgment. This was before any steps had been taken by complainant to enforce the satisfied Wheelock judgment. Complainant had paid nothing whatever for the Wheelock judgment. He had at that time parted with nothing. He had in no particular placed himself in a worse position than he was in before in consequence of the assignment. At the time he took the assignment, he also took a confession of judgment for the entire amount of his debt, which became a lien on Coffee's lands, and of itself, without reference to the assignment, gave him all the advantage he could by any possibility have obtained by the attachment proceedings, which he forbore, and put him even in a better position than the attachment would have done. The only possible object to be obtained by the assignment of the Wheelock judgment was, to get ahead of the Haggin and Tevis judgment, the lien of which had already attached;

and even for this purpose no consideration was paid or given. Besides, the assignment of the Wheelock judgment was taken under very suspicious circumstances, to say the least. Complainant dealt not with the judgment *creditor*, but the judgment *debtor*. The judgment debtor professed to control the judgment against himself. The judgment debtor, not the judgment creditor, procured, brought to him, and delivered the assignment, and without any new consideration. This is a circumstance that ought of itself to have excited the suspicion of a prudent man, and put him upon inquiry, as to how it happened that the debtor controlled the debt apparently due from himself to another. It, doubtless, would have excited inquiry, had the complainant intended to pay any consideration for the judgment, or had he been actuated by any other motive than a desire to get into a better position than he could occupy by any act of his own by obtaining a preference over a vested lien already attached in favor of Haggin and Tevis. For this purpose it was evidently not desirable to scrutinize the claim assigned to him too closely, as his knowledge would only make him *particeps criminis* in the wrongful act. For any other purpose the assignment was useless, as his own confessed judgment took precedence over all others, and afforded him all the security and all the advantages that the Wheelock judgment could give. The Wheelock judgment had cost complainant no new consideration — he had parted with nothing — at the time when Freanor's lien attached; and with reference to him he was not, under the circumstances at that time, a *bonâ fide* purchaser of the judgment for a valuable consideration.

Freanor's right vested at the time his lien attached, and at the time the Wheelock judgment had been fully paid; and, as to *him*, there was *then* no matter of estoppel in favor of complainant. Subsequent to that time, no act of either Coffee or the complainant, or both combined, could affect the rights of Freanor.

The *subsequent* issue of execution upon the Wheelock judgment, the sale thereunder, and the allowing of complainant's lien under his own judgment so far as not satisfied by other sales to lapse, in no way affected the rights of Freanor already vested. In my judgment, the sale and conveyance to Freanor under his judgment vested in him the legal title to the land. Freanor's title was from that time perfect, and in no respect dependent upon the proceedings to annul the sales under the Wheelock judgment, subsequently taken. The only effect of the decree in the case of *Freanor* v. *Lee* was to remove a cloud from his title previously acquired. I see no sound reason why, upon the receipt of the sheriff 's deed, he could not at once have maintained an action at law upon his title to recover the land against the complainant, or any other party who might have been in possession. See the authorities before cited.

If I am right in this view, then Freanor's deed to Thomas J. Haynes conveyed a complete title, irrespective of the proceedings in equity, in which the sales and conveyances to complainant under the Wheelock judgment were declared void.

But if wrong in this, the view I take upon the other points would lead to the same result. I am by no means clear that the power of attorney to J. W. Haynes is not of itself ample to empower him to authorize Colonel Crockett to appear in the case of *Freanor* v. *Lee* and consent to the decree

entered. It is true that there is no express power to convey land, or authority in so many words to abrogate titles to land. But is not the power assumed by Haynes under the circumstances of this case incidental to other powers granted? It does authorize Haynes to collect, demand, and receive all money due complainant, to sue therefor, and employ counsel to appear for him as he may deem expedient for the recovery of the same, and for that purpose "to submit to arbitration and compound the same," and "particularly to prosecute through final process any and all judgments to me belonging, and at the sale under the execution issued thereon to become the purchaser in my name of any lands," &c. This power of attorney was executed on July 5th, 1859, — the day on which complainant left California, and four days after the first sale on the Wheelock judgment. The subsequent sale on the second execution issued on that judgment was made by Haynes himself, August 1st, in pursuance of this power of attorney and instructions from complainant. The power of attorney then was made in part with special reference to collecting the money from Coffee on these judgments, the object at the time being to obtain money, not land. The title even on the first sale had not yet vested in complainant. He had only got an inchoate, contingent interest, which might be defeated on paying the money and redeeming within the time appointed by law. The subject matter, then, upon which this power of attorney was intended to operate was in part these judgments and executions, and with a view to securing the money due thereon; and to that end the attorney was authorized to act as to him it should seem best for the interest of his principal, to employ counsel in relation thereto, and "to arbitrate or compound the same." The end to be accomplished was to obtain a real, substantial satisfaction of these judgments by collecting the money, and the attorney was authorized to bid in the property in case it should be deemed necessary or advisable, at the contemplated sale, and to receive the redemption money in case it should be paid on the sale already made, and other sales to be made. Haynes proceeded to sell, and there being no other satisfactory bidders, he purchased for complainant, the amount being credited on the judgment. It turned out that he got no money, and in the opinion of his counsel no land, and consequently no real, although an apparent satisfaction of the judgment. He had, as he had good reason to suppose, utterly failed to accomplish his trust, — had failed to collect the money or obtain an equivalent, the title having failed through an incurable vice in the judgment through which he sought to make the money. An opportunity occurred, however, by which, through a compromise or *compounding* of the matter, he could effect the object of the power and still secure payment. Even if he erred as to complainant's real legal rights, there was the strongest reason to fear the loss of the property. It is difficult to see wherein this fails to come within the purview of the power. The contest is not yet ended. The fruits of his efforts are about to slip from his grasp, unless he proceeds further; and he does proceed, and through a compromise secures the full amount due his principal. It appears to me that this power to enter into the arrangement by which he ultimately secured complainant's debt is incident to the main power conferred to collect these judgments. But however this may be, this power of attorney was not the only authority Haynes had. It is not necessary

that authority should be conferred by a formal, technical power of attorney. After these sales had taken place, and after the execution of the sheriff's deeds, Haynes had informed complainant, by at least two letters received by him at Washington, before the war broke out, that his title was likely to be contested by Coffee's creditors, on the grounds already discussed; and in one of these letters Freanor was particularly referred to, as one who claimed the title under the Wheelock judgment to be void. In answer to these letters, and in reference to the threatened contest mentioned therein, he writes to Haynes, and in a letter bearing date April 6, 1861, among other things, says: "As to the Oakland property, you must be governed by your own judgment as to its management, and, *should it be necessary to go to law, employ whom you think best.*" And in a letter dated April 6, 1861, in answering the letter referring to Freanor, and acknowledging the receipt of Rogers's opinion that complainant's title is invalid, he says, among other things: "As to the clause in my letter of August 22, '60, *you must, as in all cases connected with my Oakland property, be governed by your own judgment, and such legal advice as you may deem expedient.*" Thus, in addition to the fact that the collection of the demand against Coffee, and the completion of the enforcement of the Wheelock judgment, had been committed to Haynes by his formal power of attorney dated July 5, 1859, the complainant, after being informed that the title acquired was likely to be attacked by creditors of Coffee, and Freanor especially, and of the opinion of counsel that his title was invalid, further by letter commits the matter to *Haynes's discretion*, with directions to employ such counsel as he should deem prudent. In one of these and in other letters he directed him to employ Colonel Crockett in all matters relating to his interests where his services could be had.

In my judgment, under this power of attorney, and these subsequent instructions taken together, Mr. Haynes was fully empowered to employ counsel in the case of *Freanor* v. *Lee* subsequently commenced; and that both they and the counsel employed were authorized to pursue the course they did, if in their judgment that course was most conducive to the interests of complainant. That they acted in good faith, I see no good reason to doubt. Soon after the last letter from complainant referred to was written, the war of rebellion broke out, and complainant resigned his commission in the United States army, and withdrew himself within the rebel lines, where he continued in the rebel service during the war, and there was no further opportunity to communicate with him in relation to the matter. Freanor filed his bill against complainant to remove the cloud from his title. Mr. Haynes consulted Colonel Crockett, who had been complainant's attorney, and whom complainant had directed him to consult in all matters pertaining to his interest. The facts of the case having been fully investigated, both Colonel Crockett and Mr. Rogers, Haynes's own attorney, were of opinion that complainant had no title. Upon this hypothesis, the action was in no sense necessary to give Freanor a title, for that he already had. A decree would only serve to remove a cloud upon a title already perfect at law. Complainant was without title, and without the means, so far as anything to the contrary appears, to satisfy his own judgment from any other source. Upon negotiation between Freanor and Haynes, brought about through Coffee, it was ascertained that by an ap-

pearance in Freanor's suit on behalf of complainant, and consenting to a decree removing the cloud, Freanor would consent to a sale of the land and the payment of the proceeds, first, on his own demand against Coffee; secondly, the demand of complainant; and, lastly, that the balance should go to Coffee's other creditors. By this means the complainant would get all the money due him, thereby accomplishing the original object of his judgment, while on the other hand he was likely to lose all. Upon the hypothesis assumed, Freanor was in a position to hold the land himself. Nothing could be done without his assent, and he was not willing to surrender his rights for the benefit of complainant, although he would do it for Coffee's benefit. It was, therefore, in the minds of complainant's agents, and their counsel, only a question whether it was for complainant's interest to permit the cloud to be removed in consideration of getting the moneys due him, or, by refusing to enter into the arrangement, risk losing all. The former course was pursued, and I think wisely. It was such a course as any prudent counsel would be likely to advise, and any prudent business man to adopt, if present and acting for himself. I see no good ground for supposing that there was any fraud perpetrated by any of the parties engaged in this compromise. It matters not whether Freanor in surrendering his rights was actuated by motives of friendship for Coffee, or by a due regard for the intrinsic justice of the case. He was in a condition to prescribe terms, and it cannot be denied that he acted with liberality, and a due regard to the just claims of all. The arrangement agreed upon was subsequently carried out, and the result was, that Freanor obtained his money; complainant his; Coffee's other creditors theirs; and Coffee was partially, if not wholly, relieved from the inconvenience of insolvency. By the conditions of the arrangement under which Freanor conveyed to Thomas J. Haynes, complainant was only entitled to receive the amount due him. That he received, and after receiving his money, he had no further interest in the property, and it was no concern of his what became of it or its proceeds.

I do not think that either Haynes or Crockett, under the circumstances, either exceeded his powers, or improvidently or unwisely exercised them.

But if I am mistaken as to the powers of Haynes and Crockett, I think still that the judgment entered upon the appearance and consent of Colonel Crockett in *Freanor* v. *Haynes* is valid, as to the vendees of Haynes, without actual notice for a valuable consideration. The judgment is in all respects regular on its face. Colonel Crockett was an attorney of the court. He appeared as such in the case. It is true, his appearance refers to his authority, as derived through Haynes as attorney in fact of complainant, and the written authority to appear is filed and made a part of the judgment roll, or record. *But the power of attorney to Haynes is not in the record.* The record stops with the authority given to Crockett by Haynes. Whether Haynes was duly authorized or not, *was a question to be determined by the court in ascertaining whether jurisdiction of the person had been acquired; and it must be conclusively presumed that the court determined the question of Haynes's authority correctly, and upon sufficient evidence.* Purchasers were not bound to look beyond the record to see whether the judge committed any error or not. They were entitled to rely on the judgment, as they found

it. The judgment is regular on its face. *It does not of itself affirmatively show any want of authority in Haynes.* The judgment is conclusive and cannot be collaterally questioned. *Hahn* v. *Kelly*, 34 Cal. 391; *Sharp* v. *Lumley*, 34 Cal. 615, 616; *Ryder* v. *Cohn*, 37 Cal. 89; *Quivey* v. *Porter*, 37 Cal. 462; *Eitel* v. *Foote*, 39 Cal. 440; *Mahony* v. *Middleton*, 41 Cal. 41; *Blasdel* v. *Kean*, 8 Nev. 308; *Galpin* v. *Page*, 1 Saw. 309.

A point is made and pressed with some earnestness, that, *if the object* of the transaction by which the decree in *Freanor* v. *Lee* was permitted to be taken, and the property conveyed by Freanor to Haynes, was to get the title out of complainant in order to protect it from confiscation, the proceedings were all void, because complainant was, at the time, an alien enemy, and the act on that ground unlawful.

This may have been an additional motive in the mind of the counsel of complainant to assent to the arrangement contemplated. But, if so, it was merely incidental to the main object, which undoubtedly was, to secure the money due to complainant, which was in imminent danger of being lost otherwise than by confiscation. Besides there is nothing to show that Freanor was, in any way, influenced by such considerations. The title conveyed, and the trusts imposed by him, at least as to parties other than complainant, cannot be affected by the secret motives which actuated the representatives of the latter in consenting to the decree.

It is further claimed, that a valid judgment could not be obtained removing the cloud upon Freanor's title, even if the court could get a service of process in any mode recognized by law, or acquire jurisdiction by means of an appearance made by an attorney duly authorized. The decisions of the supreme court settle that question. In *United States* v. *Grossmayer*, 9 Wal. 75, it seems to be conceded, that "a resident in the territory of one of the belligerents may have in time of war an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in discharge of it, but in such case the agency must have been created before the war began." Now, that is the case in hand. Coffee was the judgment debtor of complainant, whose power of attorney to Haynes, and all whose subsequent instructions, verbal and by letter, relating to this business, were given before the war broke out. If Haynes had power to receive the debt or property in discharge of the debt, he must have had power notwithstanding the war to enter into these arrangements by means of which the money or property could be received. Besides, at the present term, the supreme court of the United States has held, in the *Washington University of Missouri* v. *Finch*, that a sale of real estate under a power contained in a trust deed given to secure a debt executed before the late late civil war is valid, notwithstanding the fact that the grantors in the trust deed were citizens and residents of the States in insurrection at the time of the sale made while the war was flagrant; and the court say: "But this court has never decided, nor intentionally given expression to the idea, that the property of citizens of the Rebel States located in the Loyal States was, by the mere existence of the war, exempted *from judicial process for debts due to citizens* of the Loyal States contracted before the war. A proposition like this, which gives an immunity to rebels against the government not accorded to the soldier who is fighting for that government, in the very locality where the other

resides, must receive the gravest consideration, and be supported by unquestioned weight of authority before it receives our assent. Its tendency is to make the very debts which the citizens of one section may owe to another an inducement to revolution and insurrection, and it rewards the man who lifts his hands against his government by protection to his property, which it would not otherwise possess if he can raise his efforts to the dignity of a civil war."

So, also, at the present term, in the case of *Masterson* v. *Howard*, the court say, that the existence of war "*does not prevent citizens of one belligerent from taking proceedings for the protection of their own property in their own courts against the citizens of the other, whenever the latter can be reached by process.*"

In *McVeigh* v. *The United States*, 11 Wal. 267, the court holds that an alien enemy *may be sued, though he may not have a right to bring suits* in our courts, and that when he is sued he has a right to appear and defend, and say: "Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, *it is clear that he is liable to be sued.*" These decisions cover this case. If the citizen may sue to recover a debt in his own courts due from an alien enemy, he may sue to enforce any other right. Freanor having a right of action, as he claims, against Lee to remove a cloud upon his title, filed his bill in equity for that purpose. The statute of California provided for procuring service against non-residents in such cases by publication of summons, so that service could have been had in a mode provided by law as well against an alien enemy as against other non-residents. Section twenty-two of the California Code of Procedure at the time provided, that, "after the filing of the complaint a defendant in an action may appear, answer, or demur, whether summons be issued or not, and such appearance, answer, or demurrer shall be deemed a waiver of summons." Before the commencement of the war, complainant, Lee, had empowered Haynes to employ counsel in any matters of litigation that might arise touching his interests in California, as we have seen, and upon the filing of Freanor's complaint, Colonel Crockett was employed to appear in the case, which he did. This gave the court jurisdiction even though complainant, at the time, was an alien enemy. The other questions have been already discussed.

It ought to be added, that I find no offer on the part of the complainant in his bill to return the money he has received under the arrangements which he now seeks to set aside. If he demands the lands after the large increase in value which has accrued during the ten years' growth of the city of Oakland, before the commencement of this action, also enhanced by the improvements put upon them by the parties since the transactions set out have occurred, he, certainly, ought to offer to return the amount of the debt received by him in lieu of the lands. But aside from this defect in the bill by failing to offer to do equity, I find no ground for equitable relief. On the contrary, I think, under the circumstances shown, the complainant has abundant reason to be satisfied with the acts of his agents and attorneys, and to congratulate himself, that in his efforts to obtain an undue advantage over prior lien holders, he did not ultimately lose the advantage to which he was justly entitled.

The bill must be dismissed with costs, and it is so ordered.
B. S. Brooks, for complainant.
Rogers, Williams, Irving, Crane, Barstow & others, for defendants.

SUPREME COURT OF NEBRASKA.

[January Term, 1874.]

CONTRACT TO INSURE. — PROOF OF LOSS.

J. D. McCANN et al. v. *ÆTNA INSURANCE COMPANY.*[1]

Held, that in an action against an insurance company to compel it to issue a policy upon an alleged contract of insurance, there must be conclusive proof that such contract was actually made.

Held, that due notice of loss, and statements supported by affidavits, are conditions precedent to recovery.

Appeal from district court of Otoe County.
Shambaugh & Richardson, for plaintiffs.
S. H. Calhoun, for defendants.

Gantt, Assoc. J. The plaintiffs claim that on the 11th day of October, 1865, they made a verbal application to the agent of defendants for an insurance on the one half of the steamboat Sunset, and that the defendant by its agent, James Sweet, accepted such application and agreed to take the risk. The defendant denies the alleged contract of insurance on the steamboat, and makes several other defences. Considerable testimony was taken in the case, but the substance of all the testimony in respect to the alleged contract is that of McCann, one of the plaintiffs, that on the day above stated he went to the office of James Sweet, the agent, and by verbal agreement with him as the agent, he effected an insurance on the one half of the steamboat in the Ætna Insurance Company, and that this conversation was the only one in which he made a direct application for such insurance. Also that of James Sweet, the agent, that no such contract of insurance was made; that he told Mr. McCann he could not issue such policy, but that he could take his application and send it to the office of the general agent, and that McCann quickly left his office, without leaving a written application. And that of S. H. Calhoun, stating that he was in the office of Sweet at the time the conversation occurred between McCann and Sweet, and that Sweet formally told McCann he would write to the company, and see if they would take the risk; that he expressly said he could not issue a policy on the hull of the boat, but it must be done by the home office, and that McCann left the office within five minutes after he entered it. It seems that Calhoun was the only person present at the time of the conversation between McCann and Sweet, and therefore all the testimony in regard to the conversation and

[1] Opinion filed January 15th, 1874. To appear in Vol. 3, Nebraska Reports.

the alleged contract of insurance is that of these three persons. We think the testimony is not sufficient to maintain the allegations of the petition. That of McCann stands without any support whatever, while that of Sweet is corroborated by that of Calhoun. And the most favorable construction which can possibly be put upon all this testimony for the plaintiff still leaves the matter in very great doubt. In *Suydam* v. *The Columbus Ins. Co.* 18 Ohio, 459, the rule is laid down that in an action against an insurance company to compel it to issue a policy upon an alleged contract of insurance, such action cannot be sustained unless there is conclusive proof that such contract was actually made. If the matter is left in doubt upon the whole evidence, the suit must be dismissed. *Neville et al.* v. *The Merchants' and Manufacturing Ins. Co.* 19 Ohio, 452; 2 Parsons on Con. 351. But suppose the evidence were sufficient to establish a parol contract of insurance between the parties, have the plaintiffs placed themselves in a position to secure a right of action and to maintain their suit to recover damages for the loss sustained by the sinking of the boat? The assured, sustaining loss, is required forthwith to give notice to the company or its agent, and as soon as possible thereafter to make and deliver in a particular account of such loss, signed and sworn to by him, together with a statement of the whole value of the subject insured, his interest therein, and when and how the loss originated so far as he knows or believes. All these requirements are conditions precedent to be performed on the part of the assured, and until such statements and proofs are produced, the loss shall not be deemed payable. It is said that the "assured cannot be presumed ignorant of the usages of the office to which he applies for insurance," and the law will not permit him on the ground of ignorance to claim exemption from producing the notice, statements, or preliminary proof, so indispensable to his demand of payment; at least all such proofs as may be in his knowledge or possession touching the nature and extent of the loss. And it seems to be the well settled doctrine in this country that the notice and statements supported by oath are conditions precedent, and must be performed before the assured is entitled to receive payment or to sue for the loss, unless the company, by some act on its part, waives the performance of said condition. Angell on Ins. sec. 226; *Columbia Ins. Co.* v. *Lawrence*, 2 Peters, 53; *Same* v. *Same*, 10 Peters, 513; *Haff* v. *Marine Ins. Co.* 4 John. 135.

In the case at bar, it appears from the proofs that the plaintiffs did not comply with these conditions precedent, except that a copy of protest was either left with or shown to the agent. If in law the plaintiff could, on the ground of ignorance, claim exemption from producing the preliminary proofs, yet in this case they could not be permitted to plead ignorance, for the proofs show that they were fully notified to produce such statements.

J. B. Bennett, general agent of the company, testifies that McCann called at his office, in Cincinnati, Ohio, and in their conversation he "distinctly requested him to submit the proofs of his loss, to reduce his statements of facts to writing and verify them by oath, to produce a protest, and submit any facts bearing directly or indirectly on his claim." McCann in his testimony fully corroborates this testimony of Bennett; he says Bennett informed him "that no statement of the facts or proofs had been received by him, and that he could not settle the matter; that

there were many questions arising from the peculiar facts of the case," &c.; that he "returned to Nebraska City, called on Mr. Sweet, and asked him if he was prepared to pay the loss. He said he was not, and I brought the suit against the defendants." The statements, &c., were demanded of McCann, and he refused to furnish them, and therefore the loss alleged to have been sustained by the sinking of the boat was not payable; and without the production of these proofs, certainly, the agent might well say he was not prepared to pay the loss.

The failure of the plaintiffs to produce those preliminary proofs we think are sufficiently pleaded in the answer. It is true the defendants plead other defences in their answer, but that does not relieve the plaintiffs from the performance of the conditions precedent. "Good faith and fair dealing is of the essence of the contract of insurance," but the evidence shows that the plaintiffs have not so acted in the premises. They failed to produce the preliminary proofs, and when requested so to do, they refused and brought their suit; and as the alleged loss is not payable until these conditions precedent are performed, they cannot maintain their action. *Judgment affirmed.*

MAXWELL, J., concurs.

SUPREME COURT OF APPEALS OF VIRGINIA.

[MARCH TERM, 1873.]

EXECUTORS. — DUTY TO INVEST.

PERRY v. *SMOOT et als.*

S. made his will in 1858, *and died in July*, 1867. *He gave to his daughters S. and C. each ten thousand dollars, to be realized out of his estate by sale or otherwise, as early as practicable after his decease; and directed his executors to invest the said legacies in the bonds of the State of Virginia, in the names of S. and C. The residue of his estate he gave to his two sons, who were his partners in business, and who he appointed executors. When S. died his daughter C. was over twenty-one years of age, and capable of understanding her rights. The executors did not invest the* $10,000 *left to her, but retained it in their hands with her knowledge, and as they aver, by express agreement with her, and paid her the interest regularly upon it. Held, in the condition of the country from* 1867 *to* 1870, *the executors were well justified in not investing the money in state bonds.*

CHARLES C. SMOOT, a citizen of Alexandria, died in July, 1867, leaving a will which was executed in 1858. For years before the date of his will and until his death he was engaged in a mercantile business with his two sons, Charles C. Smoot, Jr., and John B. Smoot, as partners. By his will he gave two houses and lots in the city of Alexandria to his daughter Mary Ann, the wife of John Perry, and he gave to his two unmarried daughters, Susannah Adelaide, and Catherine Florence Smoot, each the sum of ten thousand dollars, to be realized out of his estate by sale or otherwise, as early as practicable after his decease; and he directs his ex-

ecutors to invest the said legacies in the stock or bonds of the State of Virginia, and in the names of his said daughters Susannah Adelaide and Catharine Florence severally, which said legacies he gave to his said two daughters for their sole and separate use and property, free and exempt from the debts, liabilities, and control of any husband either of them may marry, with power of disposition either in their life-time or by last will. He gave all the rest of his estate, both real and personal, to his two sons Charles C. and John B. Smoot; and he appointed them his executors.

In 1869 Catharine Florence Smoot having married Wm. Perry, a suit was instituted by them, and afterwards in the name of Catharine Florence by her next friend, against Charles C. and John B. Smoot, as executors of Charles C. Smoot deceased; and in the bill it was charged that the testator left an estate of not less than $150,000; that the investment of the $10,000 left the plaintiff might have been made within six months after his death; but the executors had chosen to retain the money in their own hands, paying her simply six *per cent.* interest upon it; that in failing to make the investment they had been unfaithful to the trust reposed in them, and had greatly injured the plaintiff. The prayer of the bill was that the defendants may be required to purchase for the plaintiff as much state stock as might have been purchased with $10,000 at the time the investment ought to have been made, and for general relief.

The executors answered the bill. They say that the estate of their testator was worth about $60,000, instead of $150,000. That the devise to Mary Ann Perry and Susannah Adelaide who had married Thomas Perry, had long since been paid and satisfied. That the plaintiff at the death of their testator was twenty-three years of age, intelligent, and fully informed of her rights; that the respondents paid her the interest on the $10,000 from the death of their testator, and she received the same in accordance with an agreement between them to that effect. It is true that they had not invested the $10,000 as directed by the will; but this was because the plaintiff, after a full discussion of the subject, shortly after the testator's death determined to leave it in the hands of the respondents on legal interest, until she should require it to be otherwise disposed of or invested; of which she agreed to give them reasonable notice. This notice came on the 1st of April, 1869, in the shape of a demand from her husband, about two months after his marriage with the plaintiff, for the payment of the money to himself; and his suit was brought in two days after that demand. They deny that the plaintiff has been injured by the non-investment of the said $10,000 in Virginia stock. In 1858, when the will was made, state stock was considered a safe and profitable investment; but in 1867, when the respondents commenced executing the will, they did not, in view of the great changes that had taken place since the will was made, and of the depreciated and unsettled condition of such stock, feel authorized to invest $10,000 in such unreliable and unprofitable property; and they were therefore gratified when the plaintiff, long prior to her marriage, agreed that the said money should remain in the hands of the respondents on legal interest. How it shall be invested they submit to the court.

In August, 1869, and before the defendants had filed their answer, the court made a decree in the cause, directing a commissioner to settle the account of the administration of the executors, and to ascertain and report

the amount of property of every kind that came into their hands, with the description thereof; the earliest practicable time after the death of the testator at which the sum of $10,000 directed by the will to be invested in Virginia state stocks, for the sole and separate use of the plaintiff, could have been realized out of the estate of the testator by sale or otherwise; the market value of Virginia state stock at that time; the lowest market value of said stocks at any time between the periods at which the said $10,000 could have been realized and the date of the decree; and what would have been the present value of $10,000 worth of registered stocks of the State of Virginia if the same had been purchased as directed by the will of the testator, and what amount of interest would have been collectable on the same up to the date of the decree.

The commissioner reported that the estate of the testator consisted at his death of real estate $42,900, of bonds of the State of Virginia and other stocks $4,195.64, and of his interest in the partnership $15,000 = $62,195.64; that the $10,000 might have been realized and invested within six months from the death of the testator; that the market value of Virginia State stock at the end of six months from the testator's death, was thirty-seven cents; the lowest value up to the time of the decree was thirty-six cents; and assuming the lowest value as the proper basis of the settlement, he ascertained the amount of principal which the $10,000 would have purchased at $27,777.77; or in United States currency $13,055.55; the interest paid by the State on that amount at $791.67; and the interest placed to the credit of the bondholders at $1,583.33 = $2,375. And rejecting the claim of the executors for a credit for the succession tax on the $10,000 of $100, he stated their account with the plaintiff, showing them indebted for interest $1,683.33, after crediting them with $975 of interest paid by them to her.

The executors excepted to the report for the failure to credit them with the succession tax, and for fixing the amount of principal due the plaintiff at $13,055.55 and interest at $1,683.

The cause came on to be heard on the 14th of February, 1870, when the court sustained the said exceptions to the commissioner's report; and it appearing from a statement filed that, after the application of such credits as the defendants are entitled to, there was in their hands the sum of $9,884.25, which should be invested in registered stock of the State of Virginia, it was decreed that they should make said investment in the name of the plaintiff for her sole and separate use, free from the debts and control of her husband, and that they should pay to her the balance of the interest then due to her, to wit, $524.92, and the costs of suit $57.42. And it appearing that the defendants had brought into court and delivered to the attorney of the plaintiff the state bonds, and paid him the money as directed by the decree, the same was made a final decree in the cause. From this decree the plaintiffs applied to this court for an appeal, which was allowed.

Claughton, for the appellant.

Smoot, for the appellees.

STAPLES, J. The testator, Charles C. Smoot, died in the city of Alexandria on the 31st of July, 1867. By his will, bearing date February 16th, 1858, he devised to his daughter Mary A. Smoot certain real estate

in said city; to his daughters Susannah A. Smoot and Catharine F. Smoot he bequeathed the sum of ten thousand dollars each, to be realized out of his estate, by sale or otherwise, as early as practicable after his decease; and he directed his executors to invest said legacies in the stocks or bonds of the Commonwealth of Virginia. All the rest of his estate, real and personal, the testator devised and bequeathed to his sons Charles C. Smoot and John B. Smoot, whom he appointed his executors. The will was admitted to probate, and the executors qualified in October, 1867. The legacy to Susannah A. Smoot has been paid or arranged by the executors. The whole controversy in this case grows out of the failure of the executors to invest the ten thousand dollars given to Catharine F. Smoot according to the directions of the will.

It is insisted by the complainants, that the investment ought to have been made as soon as it was practicable after the death of the testator; and that it was practicable so to do at any time within six months after that period. Not having made the investment at the time they should have made it, the executors are answerable for any loss by the subsequent rise in the price of the stock. It is certainly true that where a trustee is required by the terms of the trust to invest in public securities funds in his possession, and instead of doing so, he appropriates them to his own use, or otherwise unreasonably delays the investment, the *cestui que trust* has the option of charging him with the principal sum and its interest, or with the amount of stock he might have purchased with the money. And the same rule applies to an executor, who is also a trustee, but having fully administered the estate retains the legacy in his possession, not as assets of the estate, but as trustee of the legacy. In all such cases the trustee or executor is regarded as a wrong-doer; and as such, he is compelled to place the injured party in the same situation he would have been in if the wrong had not been done. But where the executor has received no funds for investment, and is required to raise them in the course of his administration, there can be, in the nature of things, no fixed rule as to the time within which the trust is to be executed. The farthest the courts have gone is to say that the investment must be made within a reasonable time. What is a reasonable time depends upon all the circumstances of the case. In one instance a year from the testator's death was considered a reasonable time for the purchase of United States stock. This rule was adopted in analogy to the payment of legacies. In another case the same period was regarded a reasonable time, although the trustees were directed to invest in the purchase of land with all convenient speed. Perry on Trusts, 462, and cases there cited; Hill on Trustees, 370–471. And under our statutes the executor is not compellable to pay any legacy given by the will, or make distribution, until after a year from the day of his qualification; and even then he can only be required to make such payment or distribution upon being secured by proper refunding bonds.

In this case the executors qualified in October, 1867. The estate which came into their hands is estimated by complainants at one hundred and fifty thousand dollars. The commissioner, however, reports it as of the value of sixty-two thousand dollars only. It consisted of real estate valued at forty-two thousand dollars, the interest of the testator in an unsettled partnership amounting to fifteen thousand dollars, and certain

stocks and securities not exceeding four thousand dollars. From such sources the executors were required to raise the large sum of twenty thousand dollars. The testator was well aware of the difficulties they might encounter in carrying out his wishes. He therefore directed that the legacies should be realized out of his estate, not immediately, but by a sale as early as practicable after his decease. He did not intend that his sons should sacrifice the property given to them in paying the legacies to the daughters. He no doubt had entire confidence in the integrity and sound judgment of the former, and it was his purpose they should exercise a fair and liberal discretion in carrying out his instructions.

I think that discretion has not been abused; and that the executors were well justified in declining to make the investment. The condition of the State politically and financially from October, 1867, to January, 1870, when the decree complained of was rendered, is a matter of public history. The reconstruction acts passed in the beginning of the year 1867 declared that no legal governments existed in the states south. Virginia was denominated Military District No. 1, and as such was placed under the control of a general of the federal army; her judicial, executive, and ministerial officers were removed, and their places occupied by military appointees, and all the departments of the government, with all the great interests of the State, political and financial, subjected to a military domination acknowledging no constitutional responsibility. How long this state of things was to continue no one could foresee. Reflecting men, attentive observers of the times, were profoundly despondent of the future. They believed the termination of the military power would be followed by the establishment of a civil government greatly more disastrous to the prosperity of the State. Whether these fears were well or ill founded, whether they would have been realized in any event, it is not our province to inquire. It is certain that this condition of things exerted a most depressing influence upon the spirit and temper of the people, upon all the industrial interests of the State, its credit, its business, and its progress. The effect upon the credit of the State is apparent from a single fact disclosed by this record, that in 1867 and 1868 state bonds commanded in the market about thirty-eight cents in the dollar only. Capitalists might purchase such securities upon speculation, but few would regard them as safe and judicious investments. The executors no doubt acted upon these views. They wisely abstained from embarking the fortune of their sister in securities which did not and could not command public confidence, and might at any day become utterly worthless in the commercial world.

All the circumstances and facts of the case tend to show that complainant throughout was informed of the failure of the executors to make the investment. She resided in the same town with them. At the death of the testator she was over twenty-one years of age, and fully competent to understand her rights. If the investment had been made, the bonds would have been in her possession, and the interest collected from the State by her authority alone. But instead of this she received from the executors annually a sum or sums equal to the yearly interest upon the amount of her legacy. She received the payments without objection or complaint, although she must have been apprised they were made by the executors as borrowers of the fund due her. In *Byrchall* v. *Bradfield*,

6 Mad. R. 148, cited by complainant's counsel, Sir John Leach directed an inquiry by a commissioner to ascertain whether the legatees were informed at any time that the executor had retained the legacy in his hands. It appeared that he had so retained it for ten years, paying interest to the *cestui que trust* under a representation that the legacy had been invested according to the trusts. Under these circumstances the executor was required to furnish the stock which might have been purchased when the investment ought to have been made. It is fair to presume a different decision would have been made, if it had appeared that the *cestui que trust* had accepted the interest knowing the funds were retained by the executor. In such case he would be treated as a borrower and not as a wrongdoer. In this case there is nothing to impeach the good faith of the executors. Their conduct throughout evinced a desire to perform the duties imposed by the will, with a due regard to the interest of all the legatees.

For these reasons I am of the opinion the decree should be affirmed.

The other judges concurred in the opinion of Staples, J.

Decree affirmed.

CIRCUIT COURT OF THE UNITED STATES.

[NOVEMBER TERM, 1873.]

LIFE INSURANCE. — SUICIDE. — INSANITY.

LOUISA COVERSTON v. *THE CONNECTICUT MUTUAL LIFE INS. CO.*[1]

Held, that to make the insurer liable the mind of the deceased must have been so far deranged that he was incapable of using a rational judgment in regard to the act of self-destruction.

Held, that if the insured was impelled by an insane impulse which his remaining reason did not enable him to resist, or if his reasoning powers were so far overthrown that he was unable to exercise them on the act he was about to perform, the company is liable.

Held, that there is no presumption of law that self-destruction arises from insanity, and if, by reason of sickness, or distress of mind, or a desire to provide for his family, the insured takes his own life in the exercise of his usual reasoning faculties, the company is not liable.

Held, that the burden of proof lies upon the company to show that the death was caused by suicide and not by accident.

J. W. Deford & A. W. Benson, for plaintiff.

Mann & Parkinson and *Clough & Wheat*, for defendant.

DILLON, J. 1. This is an action on a policy issued by the defendant upon the life of the plaintiff's husband for her benefit.

That the policy was issued, and that on the 16th day of December, 1871, the assured came to his death, are undisputed facts. Under the admissions in the answer, the plaintiff makes out a *primâ facie* case for a recovery

[1] Verdict rendered December 10, 1873.

when she shows that she was the wife of the said Henry O. Coverston; that he is dead, and that due notice and satisfactory evidence of the death of the said Henry O. was given by her to the defendant or its authorized agents ninety days before this suit was brought. If these facts are shown, then it devolves upon the company to establish its defences pleaded in the answer, or some one of them.

2. The main defence relied on by the company is that the assured procured the policy with intent to cheat and defraud the company by thereafter taking his own life; and that in pursuance of this purpose the assured purposely took his own life by shooting himself on the 16th day of December. These defences are denied by the plaintiff.

3. The policy in suit contains a provision, that if the assured "shall die by suicide" the said policy should "become and be null and void."

And the first question to be determined is, did the assured shoot himself accidentally, or did he purposely take his own life by an act which he knew, designed, and intended should have that effect? If, upon the evidence, you are of opinion that the plaintiff's husband accidentally shot himself, this is not suicide and the defence fails. If, upon the evidence, you find and believe that he intentionally shot himself with the design and purpose to take his own life, this is suicide and avoids the policy, unless the evidence also establishes to your satisfaction insanity of such a character and degree as will in law prevent the act of suicide from having the effect of avoiding the policy.

4. It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable. To do this, the act of self-destruction must have been the consequence of insanity, and the mind of the deceased must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing. If he was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand, there is no presumption of law, *primâ facie* or otherwise, that self-destruction arises from insanity; and if you believe from the evidence that the deceased, although sick, or distressed in mind, formed the determination to take his own life, because in the exercise of his usual reasoning faculties he preferred death to life, or desired thereby to make a provision for his wife, then the company is not liable, because he died by his own hand within the meaning of the policy.

5. The burden of proof to show that the death of the assured was suicide and not accidental is upon the company. If you are satisfied from the evidence that the assured died by suicide, then the burden to establish the insanity of the kind and degree above mentioned, as being requisite to hold the company, is upon the plaintiff.

Verdict for plaintiff in the amount of $5,543. Defendant moves for new trial.

COURT OF APPEALS OF VIRGINIA.

[TO APPEAR IN 24 GRATTAN.]

TAXATION OF LAWYER AS SUCH NOT UNCONSTITUTIONAL.

OULD & CARRINGTON v. *CITY OF RICHMOND.*

1. *The council of the city of Richmond may lay a tax upon lawyers as such.*
2. *The ordinance of the council provides that lawyers and others shall be divided into six classes, and that those in each class shall pay a certain sum as his tax; and it directs that the committee of finance shall place each lawyer in the class to which they shall think he properly belongs, looking to all the circumstances of the case. And it is provided that when the committee have completed their classification, public notice shall be given, and any lawyer dissatisfied with his classification may appear before the committee and have it corrected if erroneous. Held, the tax is not an income tax, nor are the duties imposed on the committee legislative, but ministerial; and the ordinance is not unconstitutional.*

THIS was an action of assumpsit in the circuit court of the city of Richmond, instituted in November, 1871, by Ould & Carrington, lawyers, against the city of Richmond. The object of the suit was to test the constitutionality of the ordinance of the city council, imposing a tax on lawyers. Issue was made up on the plea of "non-assumpsit," and the whole matter of law and fact was submitted to the decision of the court.

The power of taxation vested by the charter in the council of the city is stated by Judge Anderson in his opinion, and need not be repeated. By the ordinance imposing taxes, persons following various employments in the city were classified, and a specified tax was imposed on each class. Among these were lawyers, who were divided into six classes. The eleventh section of the ordinance provides: "That the committee on finance shall place each person and firm employed in the trade or business referred to in sections three, four, five, seven, and eight, in the class to which the committee shall be of opinion such person or firm properly belongs, looking to all the circumstances of the case." And it was directed that when the committee had completed their classification, they should give notice of the fact by publication in two of the papers of the city, and that the committee would meet at a specified time to hear any application for a correction of the classification; and in the mean time the list was left in the auditor's office, open for the examination of all persons interested in the matter.

In 1871 the committee of finance placed the plaintiffs, as lawyers, in the first class, and classified all lawyers practising in the city in the respective classes mentioned in section five of the ordinance, — that being the section in reference to lawyers. In doing so the committee had no assessment of the plaintiffs' income from their profession before them; nor did the committee ascertain, or attempt to ascertain, their incomes in any way; but formed its own estimate, without evidence, of the reputation and standing of the lawyers practising law in the city of Richmond, including the plaintiffs, and their supposed capacity to make profits in

that way, relatively with each other; and classified them accordingly. The committee made no report to the council of their action in the premises, nor did the council ever revise or consider it in any way; but an opportunity was offered to all the lawyers to show, each for himself, that they had been taxed too high in the manner provided in the eleventh section of the ordinance, and some of them availed themselves of that opportunity, and among them the plaintiffs, whose tax was reduced from one hundred and fifty to one hundred dollars; but in doing so the committee acted without evidence of the relative incomes of the lawyers embraced in the classification. The plaintiffs having paid the tax under protest, after the officer had levied upon their property, brought this action to recover it back.

Upon the hearing of the case there was a judgment for the plaintiffs; and the city of Richmond having taken an exception to the opinion and judgment of the court, applied to this court for a *supersedeas*, which was awarded.

Meredith, for the appellant.

Wm. Green & R. T. Daniel, for the appellees.

Anderson, J. The power to tax rests upon necessity, and is inherent in every sovereignty. It is included in the general grant of legislative power, and reaches, as is said by Mr. Justice Cooley, "to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession." "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent, within the state or corporation which imposes it, which the will of such state or corporation may prescribe." Cooley on Constitutional Limitations, chap. 14, p. 479–482. And in the language of Chief J. Marshall, the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised, on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against its abuse is the structure of the government itself. The influence of the constituents over their representative is the safeguard against its abuse. *McCulloch* v. *Maryland*, 4 Wheat. 316–428. It must always be conceded that the proper authority to determine what should and what should not properly bear the public burden is the legislative department of the state. This is true not only of the state at large, but it is true also in respect to each municipality, or political division of the state. But these municipal corporations have only such powers as the legislature of the state confers on them. Cooley's Const. Lim. 488. And their powers are controlled by the Constitution of the United States, and of the state. The restrictions which they impose on the legislative power of the state rest equally upon all the instruments of government created by it. Ib. 198.

The powers of public corporations are either express, implied, or incidental. And except as to such powers as are incidental, the charter itself, or the general law under which they exist, is the measure of the authority to be exercised. They have no inherent jurisdiction, like the state, to make laws, or adopt regulations of government. They are governments of enumerated powers, acting by a delegated authority; so that while the

state legislature may exercise such powers of government, within the description of legislative power, as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and such as are incidental, subject to such regulations and restrictions as are annexed to the grant. Cooley, 192.

With these general principles in view, we will now inquire whether the charter of the city of Richmond invests the municipality with power to impose the tax complained of. And then if such power is conferred, has it been properly exercised in this case? By section 69 of the charter, sep. acts of 1869–70, p. 138, it is provided that, "For the execution of its powers and duties, the city council may raise annually, by taxes and assessments in said city, such sums of money as they shall deem necessary to defray the expenses of the same, and in such manner as they shall deem expedient, in accordance with the laws of this State and of the United States." This clause confers the general power of taxation, except only as it may be limited by the laws of the State and the United States; and includes all powers and subjects of taxation. And as to the manner of laying the tax, the council is invested with full discretion. And they are authorized to lay a tax to defray the expenses of the city to an amount which they may deem necessary. It seems to me that this language is broad enough to embrace, not only a tax on real and personal property, but every other description of tax which the council might deem necessary and proper, unless its meaning is limited and circumscribed by what follows.

The clauses of *this* section, which follow, are evidently designed to restrict the unlimited power of taxation given by the clause which has just been recited, to a certain extent, by prohibiting certain taxation which would have been included in the power given, if not thus restricted, to wit, on city bonds, or capital invested in real estate, or in manufactures outside the limits of the city, although the persons engaged in such business or manufactures have a place of business in the city; upon the stock of a corporation and the dividends thereof at the same time; upon any capital, &c., employed in a business upon which a license or other tax is imposed.

These are the only limitations as to the subjects of taxation; and consequently the power of taxation, on all other persons and subjects of taxation, is given. The other restrictions are, as to the mode or manner of taxation; and they are, that the tax on property shall be equal and uniform; that capital invested in business operations shall be taxed as other property; and that stocks shall be assessed according to their market value. The power to tax lawyers' licenses is unquestionably included in the general power given by the first clause of this section; and there is nothing in the clauses limiting and restricting the general power which exempts them. Is there anything in the next section which is restrictive of this power?

This section does not employ the language of restriction. It purports to give power, not to abstract or to withhold it. It gives to the city council power to grant or refuse a license in certain cases, and to tax the license when given. After enumerating several, it adds in general terms, to "all other business which cannot be reached by the *ad valorem* system

under the preceding section," the council may grant or refuse a license, and tax the same when granted. Lawyers are not named among those to whom licenses may be granted or refused, and taxed, and I think were not intended to be included. They could not be included in a provision to authorize a tax upon an occupation or business to which the council might grant or refuse a license; for a lawyer has obtained his license from the state, and it is not within the province of a municipal council to grant it, or to take it away. Yet, whilst a lawyer's license authorizes him to practise law in any court of the commonwealth, and it is not in the power of any municipality to deprive him of that right, or to take away his license, it is a civil right and privilege, to which are attached valuable immunities and pecuniary advantages, and is a fair subject of taxation by the State, or by a municipal corporation where he resides and enjoys the privilege. It is a vested civil right; yet it is as properly a legitimate subject of taxation as property to which a man has a vested right. I cannot perceive that there would not be as much reason for saying that a man's property is not taxable, because he has a vested right to it, as for saying that a lawyer's license is not taxable, because he has a vested right to it.

I am of opinion, therefore, that the power to tax a lawyer's license is included in the general power of taxation given by the first clause of § 69; and that it is not taken away by anything that follows. But, if I were mistaken in this view, and the power is not given by the 69th section, it is given by section 1.

By that section it is enacted that the city of Richmond, for all purposes for which towns and cities are incorporated in this commonwealth, shall continue to be one body politic, "and as such shall have, exercise, and enjoy all the rights, immunities, *powers*, and privileges, and be subject to all the duties *now* incumbent and appertaining to said city as a municipal incorporation." Acts of 1865–66, p. 241. By section 68 of the act passed February 7th, 1866, then in force, it is enacted that, "For the execution of its powers and duties, the council may tax real estate in the city; all personal property therein," &c.; and by section 69, "The council may tax the keepers of ordinaries, brokers, lawyers, physicians and dentists," &c. It appears, then, that the corporation was expressly invested with power to tax lawyers when, and before, the new charter of 1870 was granted; and it is expressly enacted in the 1st section thereof, that the corporation shall have, exercise, and enjoy all the powers then appertaining to the city as a municipal corporation. The power of taxation was one of its most important powers, and could be exercised only through the council. This general grant of power seems designed to supply any omissions which might be made in the provisions of the act which was to follow. So that the corporation would be invested, not only with the powers expressly granted therein, but also with all other powers with which it was then invested by previous acts of the legislature. I am of opinion, therefore, upon both grounds, that the power to tax lawyers is clearly given by the charter. It only remains to inquire, Has it been constitutionally exercised in this case?

By an ordinance of the council, the lawyers of Richmond were divided into six classes; and the individuals of each class were assessed with a

certain amount of taxes; and a committee was appointed, charged with the duty of assigning them to the class to which they respectively belonged. It is contended that the council could not delegate this power to a committee.

That the power of taxation is an important and delicate trust confided to the council, and cannot be delegated by them to a committee of their own body, or to any other agency, is unquestionably true. It is a legislative power; and when granted to a municipality, it can only be executed by itself, or by such agencies or officers as the statute has pointed out. So far as its functions are legislative, it rests in the discretion and judgment of the municipal body intrusted with it; and that body cannot refer the exercise of the power to the discretion and judgment of its subordinates, or of any other authority. Cooley, 204, 205, and cases cited.

But was the assignment of the lawyers to their respective classes a legislative function? The enactment that the lawyers should be divided into six classes, and that a tax of so much should be levied upon each individual of a class, was legislative, and was performed by the council itself. Was the inquiry as to which class the lawyers should be respectively assigned, and the assignment of them to their respective classes, a legislative or ministerial act? If it is a legislative function, the commissioners of the revenue, under a delegated authority from the general assembly, have been performing yearly, without question, legislative functions. It is a service which could not be well performed by the legislative body. It is the function of a commissioner, in order to the execution of a legislative act, and is ministerial; and it seems to me, that it was competent for the council to require the service to be performed by a committee of their own body, as well as by a commissioner, or the general assessor. And it was not more necessary that the action of said committee should be reported to the council, and have its confirmation, than that similar duties by a commissioner of the revenue should be reported to and confirmed by the legislature of the state. But the tax-payer should be provided with ample remedies for redress, if he has been aggrieved by the action of the committee. Whether the remedy provided in this case by the ordinance of the council is adequate or not, there is no complaint by the appellees that any injustice has been shown to them; and it is a question, it seems to me, for the council and their constituents, and does not come within the province of the courts.

It is objected, also, that the mode of ascertaining the class to which the lawyers should be respectively assigned was uncertain, and wholly inadequate to the attainment of justice, and vitiates the whole proceeding. If it be an income tax, as is contended it was designed to be, an assessment was necessary to ascertain what was the income of the lawyer to be taxed. And if it was not an income tax, but a license tax, that is a tax on the civil right or privilege conferred by the license; the tax ought to be proportioned, as nearly as practicable, to the value of that right and privilege. But exact justice and equality are not attainable, and consequently not required. Cooley on Con. Lim.; *Slaughter's case*, 13 Gratt. 767; *Eyre* v. *Jacob*, *Sheriff*, 14 Gratt. 422, 434, 435; *Gilkeson* v. *Frederick Justices*, 13 Gratt. 577.

I do not think it was intended to be a tax on income. The classifica-

tion of the lawyers show this. It was intended to be a tax on the civil right and privilege. And it is true that the tax ought to be proportioned, as nearly as practicable, as I have said, to the value of the privilege. Justice and equality, which are of the essence of constitutional taxation, require it. The act of council requiring the assignment of the lawyers into six classes, and the gradation of the tax upon them, according to the class to which they were respectively assigned, shows an intended approximation to equality; and if the assignment is fair and judicious, as nearly attains it as is perhaps practicable in a license tax. It is true that the principle upon which this classification is made by the 5th section of the ordinance, which is in relation to the classification of lawyers, doctors, &c., is not in terms expressed. The 3d section in relation to commission merchants, brokers, &c.; the 4th section in relation to "sellers by wholesale or retail of wine or spirituous liquors;" the 7th section in relation to "agents or sub-agents of any insurance company or office, whose principal office shall be located out of the city;" and the 8th section in relation to "express companies and telegraph companies, having a place of business in the city," all adopt the method of classification, as in the 5th section; nor in either is the principle expressly stated upon which the classification shall be made. If the tax upon lawyers is unconstitutional and void upon this ground, it is in all the other cases, which would be disastrous to the financial condition of the city; and a question involving consequences of such moment ought to be well considered by this court before it declares those ordinances unconstitutional and void on this ground.

The 11th section provides, "that the committee of finance shall place each person and firm, employed in the trade or business referred to in sections 3, 4, 5, 7, and 8, in the class to which the committee shall be of opinion such person or firm properly belongs, looking to all the circumstances of the case." Now, while it is not expressed that the classification shall be made with reference to the value of the civil right or privilege conferred by the license, that, it seems to me, is the obvious design and object of the classification, and would be so understood. For what other object could a classification have been made, than to attain justice and equality as nearly as practicable by levying a tax proportionate to the value of the privilege to the party taxed; and it is to this end that the committee is instructed "to look to all the circumstances of each case." It might have been better to have expressed the object and design of the classification as a guide to the committee; but it seems to me it is manifest without being so expressed. And the charter expressly invests the council with full discretion to raise the necessary revenue, by taxes and assessments, "in such manner as they shall deem expedient, in accordance with the laws of this State and the United States." I am not aware that these provisions of the ordinance are in conflict with any law of the State or the United States. That the discretion reposed in the committee may be abused is possible; but not more likely, I think, than that the same power might be abused by a commissioner of the revenue. The council having, by their act of legislation, required the lawyers to be placed in six different classes, and declared what tax should be paid by the individuals composing each class, directed one of its most important

standing committees, the committee of finance, to assign them respectively to such class as they should properly belong. It is fair to presume that this committee is composed of intelligent, discreet, and trustworthy gentlemen, residing in different parts of the city, who would be informed as to the relative standing of the lawyers in the city, and the extent of their business, from their own observation, and from reputation, and would not be likely to err greatly in their determination as to which class they should be respectively assigned. I should suppose that there is not an intelligent business man in the city of Richmond, such a one as should be selected as a councilman, and placed on the committee of finance, who, if not sufficiently informed as to the relative practice of every lawyer in the city, could not get sufficient reliable information by inquiry, to enable him to determine, with reasonable accuracy, to which of the six classes he should be assigned, especially after a free interchange of views with the other members of the committee.

It is true that they might be mistaken in individual instances, which, I should think, however, would rarely be the case. But, as such mistakes might occur, a remedy was provided for correcting them, which was applied in this case. Now, whether this was the best mode for the attainment of justice in the classification of the lawyers, it is not for me or the court to say. But I cannot perceive that it is obnoxious to the objections urged against it in argument; or, especially, that it furnishes ground for avoiding the tax by a judgment of the court. That the confidence reposed in the committee might be abused, is possible. But it is impossible to administer government without reposing confidence in public agents. A reasonable confidence in human agents is essential to society and to the conduct of human affairs; and a law cannot be said to be unconstitutional because it reposes a confidence in public agents which may be abused.

As before said, there is no complaint that the tax imposed upon the appellees in this case is unequal and unjust. I apprehend the case was made in order to have an important principle as to the right of taxation settled, for the benefit of all concerned, as well as the immediate parties to this proceeding. It was believed that in this assessment there was an encroachment upon the constitutional rights of citizens; and this proceeding was properly instituted to test the question. From the best consideration I have been able to give the subject, my mind has been brought to a different conclusion. I do not think that the city council have exceeded their powers in the imposition of this tax. I am, therefore, of opinion to reverse the judgment of the court below.

MONCURE, P., and CHRISTIAN, J., concurred in the opinion of ANDERSON, J.

STAPLES and BOULDIN, JJ., dissented. *Judgment reversed.*

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1873.]

MUNICIPAL CORPORATION. — POWER OF, TO BORROW MONEY AND ISSUE BILLS.

MAYOR, ETC. OF NASHVILLE v. *RAY.*

Municipal corporations have not the power to borrow money without express or clearly implied legislative authority to do so.

Nor have such corporations the power to issue paper clothed with the attributes of negotiability unless authorized by legislative enactment.

And the officers of such corporations are powerless to bind the corporation without "ordinance," even where the power to borrow money and issue bills exists in the corporation.

Mr. Justice BRADLEY delivered the opinion of the court.

The defendant in error, who was plaintiff below, sued the Mayor and City Council of Nashville to recover the amount of nineteen corporation drafts, or orders, ranging from a few dollars in amount to over a thousand dollars, and together amounting, with interest, to over nine thousand dollars. In form, they were drawn by the mayor and recorder upon the city treasurer, payable to some person named, or bearer, and were impressed with the city seal. The following is a specimen of the orders: —

"$1,000. NASHVILLE, *Dec.* 23, 1868. No. 3521."

"Treasurer Corporation of Nashville pay to A. J. Duncan, or bearer, one thousand dollars on account of water-work.

"A. E. ALDEN, *Mayor.* W. MILLS, *Recorder.*

[Indorsed] "THOS. G. MAGRANE, T'r, *Dec.* 26, 1868."

This was the form in which all the city dues were usually paid. The indorsement by the treasurer was made when the orders were presented to him. Evidence was given by the plaintiff tending to show that it had been the custom for many years, when the treasurer failed to pay such checks on presentation, for him to write his name on the back, with the date of presentation, and afterward, in the payment of such checks, to allow interest from that date, and that it was usual to present such checks for indorsement to draw interest when it was known there were no funds for their payment; also, that it was the well known custom of the proper collecting officers of the corporation to receive such checks for taxes and other dues of the corporation; that, at the time these checks were issued, and at the time they were bought by the plaintiff, the city was largely involved in debt and many such checks were outstanding unpaid, and were bought and sold in the market, and nearly all the city taxes were paid therewith; that, for some time before the plaintiff purchased the checks in question, the taxes for the support of public schools were collected and paid over to the treasurer of the board of education in such checks; and, for about five months before, it had been the practice of such treasurer to sell such checks and to use the proceeds in payment of teachers; also,

that all the checks sued on (except one for $1,000, payable to Julius Sax) were so received for taxes, and paid to the said treasurer of the board of education, and by him sold soon after receiving them to one McCrery, as agent of the plaintiff to buy the same, at the rate of 80 cents on the dollar, and the proceeds paid to teachers; that the check payable to Sax was purchased from him by said McCrery, as plaintiff's agent, for $800, being one of sixteen checks of $1,000 each, issued by order of the chairman of the finance committee of the city council without any order of the council, and hypothecated with Sax as security for a loan of $12,000, payable in four months (half of which was made in city checks) — power being given in the loan note to sell the hypothecated checks if the loan was not paid when due. Sax sold the check in question to the plaintiff within a week after receiving it. The plaintiff also offered the evidence of the city recorder to show that the checks sued on were made in the usual course of business of the corporation and for corporation purposes; also, evidence tending to show that the city collector, in collecting checks for taxes, was in the habit, in making change, of paying out checks previously collected, and that the mayor and council were informed of the practice pursued by the collector of reissuing checks which he had received in payment of taxes by paying a portion of them over to the board of education, and knew of the practice of issuing and hypothecating checks for loans and selling them for money.

The defendant introduced proof tending to show that McCrery, the agent of the plaintiff, when he purchased the eighteen checks, had notice that they had been received by the tax-collector and reissued by him to the treasurer of the board of education; also, that the city council had no knowledge of the manner of making checks on the mere order of the chairman of the finance committee, and their hypothecation and sale for money; and that some of them had no knowledge of the reissue of checks by the collector.

The charter and ordinances of the city were put in evidence, and were referred to on the argument before us.

The former is couched in the usual form of such charters, conferring upon the corporation power to receive, hold, and dispose of property, to levy taxes, appropriate money, and provide for the payment of the debts and expenses of the city; to establish hospitals, schools, water-works, markets, and erect buildings necessary for the use of the city; to open, regulate, and light the streets; to establish a police, night watch, &c., and to pass all ordinances necessary to carry out the intent of the charter.

It contains, however, no express power to borrow money. But former laws (which were superseded by the charter) had authorized the issue of specific city bonds for that purpose; and such securities were outstanding in 1868, as appears by an act of the legislature, passed March 16th of that year, by which it was provided that the taxes necessary to pay the coupons and interest on the bonds and funded debt of the city should be kept distinct and should be payable only in legal currency, and no checks or orders of the city were to be received therefor. It was also enacted by the same statute that the amount necessary to be raised by tax for the sinking fund for paying said bonds, and for the support of the public schools, should be paid in the same manner.

The public ordinances of the city were published in a book, and by these it was, among other things, provided that there should be a committee of improvements and expenditures, and that all propositions for improvements, or the expenditure of money, or the incurring of any liability, should be referred to this committee, who were to report to the city council, and that no liability should be incurred unless authorized by existing laws, or by order of the city council, and that no check should be issued by the recorder upon the treasurer, unless by authority of the city council or in pursuance of existing laws of the corporation.

The defendant offered proof tending to show that there was no evidence of any authority having ever been given by the city council for the issue or reissue of checks in the manner in which the checks in question were issued and reissued.

The court was requested to give various instructions to the jury, but it will not be necessary to notice them in detail.

The charge given was in substance as follows: That the charter of Nashville authorized the corporation to issue promissory notes and other securities for lawful debts; and the instruments in question, if signed by the proper officers and given for a good consideration, were, in effect, promissory notes, legal and obligatory; that by long usage the corporation had sanctioned the authority of the officers to issue such instruments; that the purchasers thereof were authorized to presume that they were properly issued; that a usage to reissue these securities was binding on the corporation; and, though overdue on their face, they would be in law payable on demand, and not dishonored so as to let in defences against a subsequent holder, until after the lapse of a reasonable time for making demand; that the reissue and sale of the securities in question by the treasurer of the board of education, if done by the consent and sanction of the mayor, aldermen, and council, made them valid obligations against the city; and that such consent and sanction might be presumed from the publicity of the transactions, the want of other resources to support the schools, and the other circumstances of the case, without any formal official action on the subject; and that the common usage of the finance committee, to pledge the city checks as security for its notes, if known to the corporation, was binding upon it, and the checks so pledged would be valid in the hands of a purchaser before maturity, not having notice of a premature sale or other irregularity in their issue.

This charge was excepted to in all its parts, and upon these exceptions the case has been argued before us in reference to the following points: —

1. Has a municipal corporation the power, without express legislative authority, to borrow money for any of the purposes of its incorporation?

2. Has it the power, without express legislative authority, to issue its paper clothed with all the attributes of negotiability?

3. Conceding the affirmative of these two queries, can the executive officers of a municipal corporation borrow money, or issue negotiable securities for the corporation, so as to bind it, without "ordinance;" that is to say, without express authority from the legislative department of the corporate government in its collective official capacity?

A municipal corporation is a subordinate branch of the domestic gov-

ernment of a State. It is instituted for public purposes only; and has none of the peculiar qualities and characteristics of a trading corporation, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local governmental institution, it exists for the benefit of the people within its corporate limits. The legislature invests it with such powers as it deems adequate to the ends to be accomplished. The power of taxation is usually conferred for the purpose of enabling it to raise the necessary funds to carry on the city government, and to make such public improvements as it is authorized to make. As this is a power which immediately affects the entire constituency of the municipal body which exercises it, no evil consequences are likely to ensue from its being conferred; although it is not unusual to affix limits to its exercise for any single year. The power to borrow money is different. When this is exercised the citizens are immediately affected only by the benefit arising from the loan; its burden is not felt till afterward. Such a power does not belong to a municipal corporation as an incident of its creation. To be possessed it must be conferred by legislation, either express or implied. It does not belong, as a mere matter of course, to local governments to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation.

Our system of local and municipal government is copied, in its general features, from that of England. No evidence is adduced to show that the practice of borrowing money has been used by the cities and towns of that country without an act of parliament authorizing it. We believe no such practice has ever obtained.

Much less can any precedent be found (except of modern date and in this country) for the issue, by local civil authorities, of promissory notes, bills of exchange, and other commercial paper. At a period within the memory of man the proposal of such a thing would have been met with astonishment. The making of such paper was originally confined to merchants. But its great convenience was the means of extending its use, — first to all individuals, and afterward to private corporations having occasion to make promises to pay money. Being only themselves responsible for the paper they issue, no evil consequences can follow sufficient to counterbalance the conveniences and benefits derived from its use. They know its immunity, in the hands of a *bonâ fide* holder, from all defences and equities. Knowing this, if they choose to issue it, no one is injured but themselves. But if city and town officials should have the power thus to bind their constituencies, it is easy to see what abuses might, and probably would, ensue. We know from experience what abuses have been practised where the power has been conferred. Fraudulent issues, peculations and embezzlements, and the accumulation of vast amounts of indebtedness, without any corresponding public benefit, have been ren-

dered easy and secure from merited punishment. The purpose and object of a municipal corporation do not ordinarily require the exercise of any such power. They are not trading corporations and ought not to become such. They are invested with public trusts of a governmental and administrative character; they are the local governments of the people, established by them as their representatives in the management and administration of municipal affairs affecting the peace, good order, and general well-being of the community as a political society and district; and invested with power by taxation to raise the revenues necessary for those purposes. The idea that they have the incidental power to issue an unlimited amount of obligations, of such a character as to be irretrievably binding on the people, without a shadow of consideration in return, is the growth of a modern misconception of their true object and character. If in the exercise of their important trusts the power to borrow money and to issue bonds or other commercial securities is needed, the legislature can easily confer it under the proper limitations and restraints, and with proper provisions for future repayment. Without such authority it cannot be legally exercised. It is too dangerous a power to be exercised by all municipal bodies indiscriminately, managed as they are by persons whose individual responsibility is not at stake.

Vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts legitimately due to public creditors, are of course necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of *bonâ fide* holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company, and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, unless conferred by legislative enactment, either express or clearly implied.

There are cases, undoubtedly, in which it is proper and desirable that a limited power of this kind should be conferred, as where some extensive public work is to be performed, the expense of which is beyond the immediate resources of reasonable taxation, and capable of being fairly and justly spread over an extended period of time. Such cases, however, belong to the exercise of legislative discretion, and are to be governed and regulated thereby. Where the power is clearly given, and securities have been issued in conformity therewith, they will stand on the same basis and be entitled to the same privileges as public securities and commercial paper generally.

But where the power has not been given, parties must take municipal orders, drafts, certificates, and other documents of the sort, at their peril. Custom and usage may have so far assimilated them to regular commercial paper as to make them negotiable, that is, transferable by delivery or indorsement. This quality renders them more convenient for the purposes of the holder, and has, undoubtedly, led to the idea so frequently,

but, as we think, erroneously, entertained, that they are invested with that other characteristic of commercial paper, — freedom from all legal and equitable defences in the hands of a *bonâ fide* holder. But every holder of a city order or certificate knows, that to be valid and genuine at all, it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bonâ fide* holder will always be subject to this qualification. The face of the paper itself is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts cannot create an estoppel against the city itself, its tax-payers, or people. Persons receiving it from them know whether it is issued, and whether they receive it, for a proper purpose and a proper consideration. Of course they are affected by the absence of these essential ingredients; and all subsequent holders take *cum onere*, and are affected by the same defect.

We consider these principles to be so sound and fundamental as to make it a matter of some surprise that a different view should have been taken by some jurists of eminent ability. The cases on the subject are conflicting and irreconcilable. It could not serve any useful purpose to make an elaborate review of them. We have endeavored, clearly and explicitly, though briefly, to state the views which we entertain, and in accordance with which we think the questions in this case must be decided.

Much stress has been laid upon the decision of the supreme court of Tennessee, in the case of *Adams* v. *The Memphis & Little Rock Railroad Company*, reported in 2 Coldwell, 645. The mayor and common council of the city of Memphis, under a charter similar to that of Nashville, had mortgaged certain property belonging to the city, called the navy yard property, which had been given to it by the United States for the use and benefit of the city, to secure the payment of $300,000 of the bonds of the Memphis & Little Rock Railroad Company. The road of this company extended from a point opposite the city to Little Rock, in Arkansas, and was deemed of great advantage to the city of Memphis. The rents and profits of this property were also appropriated by the mortgage to the payment of the interest on the bonds thus secured, and to the raising of a sinking fund to meet the principal when due; and authority was given to the trustees of the mortgage to enter and lease, or sell in case of default in the payment of interest or principal. The court held that the general power contained in the city charter to sell, lease, and dispose of the property of the corporation for the use and benefit of the city, authorized this transaction; and that the purpose for which the mortgage was given was a proper corporation purpose within the meaning of the charter. Other doctrines were propounded in the opinion of the court in reference to the implied powers of municipal corporations, which were not necessary to the decision of the case, and need not be adverted to here. The decision itself does not, in our apprehension, necessarily conflict with the views which we have stated above. We proceed, therefore, to the consideration of the particular facts of this case.

The eighteen checks purchased of the treasurer of the board of education will be first considered. In the absence of proof to the contrary, it may be presumed that they were properly issued at their inception. Evidence was offered by the defendants, it is true, tending to show that they had not been issued in accordance with the laws and ordinances of the city. But the view which we have taken of their reissue and sale by the treasurer of the board of education, renders it unnecessary to consider that aspect of the case. It is conceded that they have been received by the collector in payment of taxes due to the city. As evidences of indebtedness, where this was done, they were *functus officio*. They were paid and satisfied. They ceased to have any validity. They could not be reissued without the authority of the city council. Certainly the treasurer of the board of education had no authority thus to reissue them or sell them. Such an authority would render him comptroller and dispenser of the city credit. If he had authority to sell them for one price, he had authority to sell them for another; and there is no limit to which he would thus have power to involve the city in debt. Nor can the purchaser waive his claim to recover the amount of the checks, and demand a reimbursement of the money which he actually paid. Considered as a money transaction, and not as a purchase of the paper, it would amount to a loan and borrowing of money on the city account. And where can authority be found for the treasurer of the board of education to borrow money on account of the city? The city council may, no doubt, assume the responsibility of the transaction and make proper provision, as perhaps in equity ought to be done, for the repayment of the money so advanced. But the transaction had not the support of legal authority, and hence the money cannot be recovered in this action.

The remaining check for one thousand dollars, purchased from Sax, was pledged or hypothecated, with fifteen others of like amount, to Sax as collateral security for a loan of twelve thousand dollars, payable in four months. This loan was secured by a note given at the same time, which recited the pledge or hypothecation of the sixteen checks, and gave Sax power to sell them if the note was not paid at maturity. Sax, instead of waiting to see if the note would be paid, sold the checks thus pledged, or at least the one in question, within a week after the loan was effected. This, of course, was not only an unauthorized, it was a dishonest, transaction, and could give no title to the purchaser as against the city. In the first place the finance committee, or its chairman, had no legal authority thus to pledge the evidences of city indebtedness and give to the pledgee the power of selling the same for any price he could get. In this way an untold amount of debt could be piled up against the city without any adequate consideration received therefor, and all the evil consequences before adverted to would be liable to follow the exercise of such a power. This very instance forcibly illustrates the mischievous results that would follow from inferring an incidental power in a municipal corporation to issue commercial securities. The check in question has the same form and appearance as all the other checks which the city officers are in the habit of issuing for ordinary city indebtedness. It must be subject to the same general rule of being valid, or otherwise according as it was properly or improperly, lawfully or unlawfully, issued. And the subsequent

holder, whether purchaser or otherwise, takes it with all the original defects of title.

The judgment must be reversed, and a *venire de novo* awarded.

In this opinion Justices MILLER, DAVIS, and FIELD concurred.

Mr. Justice HUNT. I concur in the judgment of this court reversing the judgment at the circuit and remanding the case for further proceedings. I do not, however, concur in some of the grounds upon which the reversal is placed in the opinion delivered by Mr. Justice Bradley, and, as my concurrence is necessary to the rendering of the judgment, there is a manifest propriety in an expression of the grounds of my concurrence. This I procced to make in the briefest manner.

I am of the opinion that the judge erred in charging and deciding that if the checks "are, upon their face, overdue at the time of such sale (that is, their reissue and sale), they will be in law payable on demand, and are not to be deemed dishonored so as to let in defences between the company and a subsequent holder of the paper until after the lapse of a reasonable time, after their reissue, for the making of such demand." All of the checks in question had been presented for payment. Payment was not made, but the time of presentation was noted in each instance, and interest was allowed upon the check from that date.

The purchase of these checks was made by the plaintiff, as to a portion of them, on the 28th of January, 1868, and the residue on the 9th of February of the same year. The presentation and neglect to pay had been made in some instances nearly four months before such purchase. Thus, the check payable to Mrs. Cheatham or bearer for $750, and dated October 22, 1868, was presented for payment October 29th, and the time of such presentation was noted upon the check by the city treasurer, and it bore interest from that date. A check requires no presentment for acceptance as distinguished from presentment for payment. If once presented and payment refused, it is dishonored. Chitty on Bills, 272, *m*.

To constitute a *bonâ fide* holder of a note or check, it is necessary: 1. That it should have been received before maturity; 2. That a valuable consideration should have been paid for it; and 3. That it should have been taken without knowledge of the defences sought to be made.

Whatever defences could properly be made to these checks in the hands of the original holder could be made while they were in the plaintiff's hands. He was not a *bonâ fide* holder. Evidence to show fraud or corruption, or want of authority in their issue, should have been received at the circuit; and in excluding the offers made on that subject, and in the charge in reference to the evidence given, I think there was error. Thus, the Sax check, it was alleged, had been issued without authority, hypothecated to secure a note of the city made without authority, and sold in violation of the terms of the hypothecation. It was open to this defence in the hands of the plaintiff.

In the case of another check it was offered to be proved that it was issued without authority and upon a corrupt contract, but the evidence was excluded.

The court in another place charged the jury as follows: "If it is the usage, as sworn to by the witness Jamieson, to reissue the securities by sale in the market, they will, when so sold, be obligatory upon the corporation."

I cannot think that it is lawful for a municipal corporation to issue its checks, pay them, reissue them, and repeat this operation as often as its convenience requires. This comes too near the character of a bank of issue and deposit.

In the particulars following, my views are different from those expressed in the opinion of Justice Bradley.

I hold it to be well established by the authorities that a municipal corporation may borrow money for the legitimate use of the corporation, and that it may issue its notes for the same, unless expressly prohibited by its charter or by statute from so doing. The proposition that it cannot borrow money, unless by its charter expressly authorized to do so, is, in my opinion, unsustained by sound authority. 21 How. 424. And see 1 Dillon on Mun. Corp. §§ 82, 83, and notes, where the authorities are collected both from the state courts and from this court.

That the securities thus issued by municipal corporations are subject to the rules of commercial law when held by a *bonâ fide* holder has been repeatedly held by this court. Every recent volume of its reports contains authorities to this effect.

The authorities of the State of Tennessee sustain these general views. *Adams* v. *The Memphis & Little Rock Railroad Co.* 2 Cold. 645.

Checks of the city were issued for the payment of particular debts, and when paid should, no doubt, under ordinary circumstances, have been cancelled. A reissue of a paid check is an extraordinary proceeding. If done by an officer without the authority of the common council, it is a gross violation of duty. If with that authority, it is a loose practice, liable to abuse. Whether such reissue would be an act of positive illegality, *ultra vires* merely, or a bad practice simply, it is not necessary to decide. In neither case can the city repudiate the transaction. It is upon this point chiefly that I desire to express my dissent from the opinion just delivered.

As to all the checks in question, the record shows that they were paid over by the collector of city taxes to the treasurer of the board of education, that they were by him sold to Mr. McCrery at eighty cents on the dollar, and that the proceeds of such sales were applied to the uses of the city by an immediate payment of the wages due to the teachers in the public schools of the city. The city received this money upon the reissue of its checks. So far as Mr. McCrery is concerned, or the plaintiff who succeeds to his rights, the city now has the money in its treasury.

It is a general rule, applicable to all persons and corporations, and is a dictate of plain honesty, that whoever, knowing the facts of the case, retains and uses money received by an agent for his account, cannot repudiate the contract on which it is received. 24 How. 300; Ib. 548; Sedgw. on Const. L. 90.

Putting this transaction most strongly against the plaintiff, by assuming that this reissue was not *ultra vires* merely, but was positively prohibited by law, the city is still responsible to the holder of the checks for money it has received and still retains.

Conceding the illegal contract to be void, as forbidden by the legislature, it is to be remembered that the prohibition is upon the city only, and not upon the person dealing with it. The illegality is on the part of

the city, and not of the person receiving the checks. The contract may well be void as to the city, and its officers punishable for the offence of making it, and yet it may stand in favor of innocent persons not within the prohibition. Such was the decision in *Tracy* v. *Talmage*, 14 N. Y. 162; in *Curtis* v. *Leavitt*, 15 Ib. 9; and in *The Oneida Bank* v. *The Ontario Bank*, 21 Ib. 490. The latter case is briefly this: The general banking law of New York prohibited the issuance by a bank of a certificate of deposit payable on time. The cashier of the Ontario Bank received $5,000 in cash from one Perry, and delivered to him a certificate of deposit, post-dated about four weeks, for the purpose of raising funds for the bank. This draft Perry transferred to the Oneida Bank, which brought suit upon it. It was held, assuming this draft to be void, that the party making the contract could reject the security and recover the money or value which he advanced on receiving it. It was held further, that the right of action to recover this money passed to the Oneida Bank upon the transfer of the certificate to them. The plaintiff received the money advanced to the bank upon the illegal certificate. Both of these principles were held with equal distinctness in *Tracy* v. *Talmage*, *supra*.

They seem to me to be decisive of the right of the plaintiff to recover upon the checks, regarding them in their most unfavorable aspect, the amount of money advanced to and yet held by the city.

For the reasons thus presented, I concur in the reversal of the judgment.

Mr. Justice CLIFFORD dissenting. I dissent from the opinion and judgment in this cause, chiefly upon two grounds: 1. Because I think the opinion restricts quite too much the powers of municipal corporations; and 2. Because the doctrines of the opinion, as applied to negotiable securities of a commercial character, are repugnant to the well settled rules of law established by the repeated decisions of this court.

Dissenting, Mr. Justice SWAYNE and Mr. Justice STRONG.

HABEAS CORPUS. — CERTIORARI. — JURISDICTION OF U. S. SUPREME COURT. — TWICE IN JEOPARDY EXPOUNDED. — MODIFICATION OF SENTENCE AT THE TERM WHEN PRONOUNCED.

IN RE LANGE.

The supreme court of the United States has authority to issue a writ of habeas corpus, accompanied by a writ of certiorari, to bring before it the proceedings of a circuit court for the purpose of ascertaining whether such court has exceeded its powers.

And in a criminal case it may release the prisoner.

There can be no doubt about the general power of a court over its own decrees, judgments, and orders during the existence of the term at which they are first made; but this power must be exercised within common law restrictions and constitutional provisions that sustain personal rights.

A statute provided for fine or *imprisonment under which the accused was sentenced to pay a fine and be imprisoned and the fine was paid. At the term during which the sentence was pronounced the court sought to modify the sentence by*

changing it to imprisonment alone. Held, that there was error; that one of the alternative penalties of the law having been satisfied, the power of the court was at an end.

THE facts appear in the opinion.

Mr. Justice MILLER delivered the opinion of the court.

An application to this court was made at a former day for a writ of *habeas corpus*, on the allegation that the petitioner was unlawfully imprisoned under an order of the circuit court of the United States for the Southern District of New York. On consideration of the petition, the court was of opinion that the facts therein recited very fairly raised the question whether the circuit court, in the sentence which it had pronounced, and under which the prisoner was held, had not exceeded its powers. It, therefore, directed the writ to issue, accompanied also by a writ of *certiorari*, to bring before this court the proceedings in the circuit court under which the petitioner was restrained of his liberty. The authority of this court in such case, under the Constitution of the United States, and the fourteenth section of the judiciary act of 1789, to issue this writ, and to examine the proceedings in the inferior court; so far as may be necessary to ascertain whether the court has exceeded its authority, is no longer open to question. The cases cited at the end of this paragraph will, when examined, establish this proposition as far as judicial decision can establish it. *U. S.* v. *Hamilton*, 3 Dallas, 17; *Burford's case*, 3 Cranch, 448; *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Watkins*, 3 Peters, 193; same case, 7 Peters, 568; *Ex parte Metzger*, 5 How. 176; *Ex parte Kaine*, 14 How. 103; *Ex parte Wells*, 18 How. 307; *Ex parte Milligan*, 4 Wall. 2; *Ex parte McCardle*, 6 Wallace, 318; *S. C.* 7 Wallace, 506; *Ex parte Yerger*, 8 Wall. 85.

Disclaiming any assertion of a general power of review over the judgments of the inferior courts in criminal cases, by the use of the writ of *habeas corpus*, or otherwise, we proceed to examine the record of the case in the circuit court, and the return of the marshal, in whose custody the prisoner is found, to ascertain whether they show that the court below had any power to render the judgment by which the prisoner is held.

It appears from these that the petitioner was indicted under an act of Congress, passed 8th June, 1872 (17 U. S. Stat. at Large, p. 320, § 290), for stealing, purloining, embezzling, and appropriating to his own use certain mail bags, belonging to the post office department. Upon the trial, on the 22d day of October, 1873, the jury found him guilty of appropriating to his own use mail bags, the value of which was less than twenty-five dollars; the punishment for which, as provided in said statute, is imprisonment for not more than one year, *or* a fine of not less than ten dollars, nor more than two hundred dollars. On the 3d day of November, 1873, the judge presiding sentenced the petitioner under said conviction to one year's imprisonment, *and* to pay two hundred dollars fine. The petitioner was, on said day, committed to jail in execution of the sentence, and on the following day the fine was paid to the clerk of the court, who, in turn, and on the 7th day of November, 1873, paid the same into the treasury of the United States.

On the 8th day of the same month the prisoner was brought before the

court on a writ of *habeas corpus*, the same judge presiding, and an order was entered vacating the former judgment, and the prisoner was again sentenced to one year's imprisonment from that date; and the return of the marshal to the writ of *habeas corpus* shows that it is under this latter judgment that he holds the prisoner. It is conceded that all this was during the same term at which his trial took place before the jury. A second writ of *habeas corpus*, issued by the circuit judge, was returned into the circuit court, when the two district judges sat with him on the hearing, and the writ was discharged, and the petitioner remanded to the custody of the marshal.

The first inquiry which presents itself is as to the nature and extent of the power of the circuit court over its own judgments in reversing, vacating, or modifying them.

We are furnished by counsel with a very full review of the cases in the English and American courts on the question of the power of courts over their judgments once rendered in criminal cases. Many of these decisions in the English courts are on writs of error, and have but little bearing on the question before us. Others, which seem to present cases of judgments vacated or modified during the term at which they were rendered, are based upon the doctrines of the English courts, that there is no judgment or decree until the decree in chancery is enrolled or the judgment has been signed by the judge of the court of law and become technically a part of the judgment roll. Archbold Cr. Plead. 176.

These decisions, some of which go to the extent of denying all right to amend or change the judgment after it becomes a part of the roll, are inapplicable to our system, where a judgment roll, strictly speaking, is no part, or, at least, not a necessary part, of our system of judicial proceedings. In most, if not all our courts, a minute book, or a record of the proceedings of the court, is kept, and is the appropriate repository of all the orders and judgments of the court; and this book with all its entries is, *as a general rule*, under the complete control of the court during the term to which such entries relate.

The general power of the court over its own judgments, orders, and decrees, in both civil and criminal cases, during the existence of the term at which they are first made, is undeniable. And this is the extent of the proposition intended to be decided in the case of *Bassett* v. *United States*, 9 Wallace, 38. That was a case like this, in which, in a prosecution for misdemeanor, the prisoner had been sentenced to imprisonment. But it was by a judgment rendered on confession. He was afterwards, during the same term, brought into court and the judgment vacated, his plea of guilty withdrawn, and leave given to plead anew; and then he gave bail and his case was continued. It was in an action on the bail bond which he had forfeited that the sureties raised the question of the right of the court to vacate the former judgment.

In general terms, without much consideration, for no counsel appeared for the sureties, this court sustained the right. If it was intended in that case to raise the question of the right of the court to inflict a new and larger punishment on the prisoner, without reference to the time of his imprisonment on the one set aside, that point was not presented so as to receive the attention of the court, and certainly was not considered or decided.

It would seem that there must, in the nature of the power thus exercised by the court, be in criminal cases some limit to it.

The judgment of the courts in this class of cases extends to life, liberty, and property. The terms of many of them extend through considerable periods of time, often many months, with adjournments and vacations in the same term, at the discretion of the judge. A criminal may be sentenced to a disgraceful punishment, as whipping, or, as in the old English law, to have his ears cut off, or to be branded in the hand or forehead.

The judgment of the court to this effect being rendered and carried into execution before the expiration of the term, can the judge vacate that sentence and substitute fine or imprisonment, and cause the latter sentence also to be executed? Or if the judgment of the court is that the convict be imprisoned for four months, and he enters immediately upon the period of punishment, can the court, after it has been fully completed, because it is still in session of the same term, vacate that judgment and render another, for three or six months' imprisonment, or for a fine? Not only the gross injustice of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal, is manifest.

If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

The principle finds expression in more than one form in the maxims of the common law. In civil cases the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause. *Nemo debet bis vexari pro una et eadem causa.* It is upon the foundation of this maxim that the plea of a former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action.

In the criminal law the same principle, more directly applicable to the case before us, is expressed in Latin, "*Nemo bis punitur pro eodem delicto*" (2 Hawkins's Pleas of the Crown, 377); or, as Coke has it, "*Nemo debet bis puniri pro uno delicto.*" 4 Coke R. 43, a; 11 Ib. 93, b. No one can be twice punished for the same crime or misdemeanor, is the translation of the maxim by Sergeant Hawkins.

Blackstone in his Commentaries cites the same maxim as the reason why, if a person has been found guilty of manslaughter on an indictment, and has had benefit of clergy, *and suffered the judgment of the law*, he cannot afterwards be appealed. 4 Blackstone, 315, Sharswood's edition.

Of course, if there had been no punishment the appeal would lie, and the party would be subject to the danger of another form of trial. But by reason of this universal principle, that no person shall be twice *punished* for the same offence, that ancient right of appeal was gone when the punishment had once been suffered. The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial.

The common law not only prohibited a second punishment for the same offence, but it went further and forbade a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.

Hence to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of *autrefois acquit* or *autrefois convict* is a good defence.

In the case of *Crenshaw* v. *The State of Tennessee*, Martin & Yerger, 122, it was held by the supreme court of that State that the common law principle went still further, namely, that an indictment, conviction, and punishment in a case of felony not capital, was a bar to a prosecution for all other felonies not capital, committed before such conviction, judgment, and execution.

If in civil cases, says Drake, J., in *State* v. *Cooper*, 1 Green, 361, the law abhors a multiplicity of suits, it is yet more watchful in criminal cases that the crown shall not oppress the subject, or the government the citizen, by unreasonable prosecutions.

These salutary principles of the common law have, to some extent, been embodied in the constitutions of the several States and of the United States. By article VII. of the amendments to the latter instrument it is declared that no fact once tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law; and by article V., that no person shall for the same offence be twice put in jeopardy of life or limb, ... nor be deprived of life, liberty, or property without due process of law.

It is not necessary in this case to insist that other cases besides those involving life or limb are *positively* covered by the *language* of this amendment; or that when a party has had a fair trial before a competent court and jury, and has been convicted, that any excess of punishment deprives him of liberty or property without due course of law. On the other hand, it would seem to be equally difficult to maintain, after what we have said of the inflexible rules of the common law against a person being twice punished for the same offence, that such second punishment as is pronounced in this case is not a violation of that provision of the Constitution.

It is very clearly the *spirit* of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection.

In the case of *The Commonwealth* v. *Olds*, 5 Littell (Ky.) R. 137, one of the best common law judges that ever sat on the bench of the court of appeals of Kentucky remarked, "That every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of a dominant administration. . . . . To prevent this mischief, the ancient common law, as well as *Magna Charta* itself, provided that one acquittal or conviction should satisfy the law; or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of *autrefois acquit* and *autrefois convict*. To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently sub-

ject to changes in popular feeling and sentiment, was the design of introducing into our Constitution the clause in question."

In the case of *State* v. *Cooper*, in the supreme court of New Jersey, 1 Green, 361, the prisoner had been indicted, tried, and convicted for arson. While still in custody under this proceeding, he was arraigned on an indictment for the murder of two persons who were in the house when it was burned. To this he pleaded the former conviction in bar, and the supreme court held it a good plea. It is to be observed, that the punishment for arson could not technically extend either to life or limb; but the supreme court founded its argument on the provision of the constitution of New Jersey, which embodies the precise language of the federal Constitution. After referring to the common law maxim, the court says: "The constitution of New Jersey declares this important principle in this form: 'Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.' Our courts of justice would have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provision. But the framers of our constitution have thought it worthy of especial notice. And all who are conversant with courts of justice must be satisfied that this great principle forms one of the strong bulwarks of liberty. . . . . Upon this principle are founded the pleas of *autrefois acquit* and *autrefois convict*."

And Hawkins, in his Pleas of the Crown, says that both the pleas of *autrefois acquit* and *autrefois convict* are grounded on the maxim that a man shall . . . . not be brought into danger of his life for one and the same offence more than once. 2 Hawkins P. Cr. 515–526.

In *Moore* v. *The People of Illinois*, 14 Howard, 13, the defendant was fined four hundred dollars under the criminal code of that State for harboring and secreting a negro slave. The case came to this court under the 25th section of the judiciary act, on the ground that the right to legislate on that subject was exclusively in Congress. The court did not concur in that view of the question. But it was also urged that the party might be subjected twice to punishment for the same offence, if liable to be prosecuted under statutes of both state and national legislatures. In regard to this, Judge McLean said, in a dissenting opinion, that "the exercise of such a power by the states would, in effect, be a violation of the Constitution of the United states and of the respective states. They all provide against a second punishment for the same act." "It is contrary," said he, "to the nature and genius of our government to permit an individual to be twice punished for the same act."

Mr. Bishop, in the latest edition of his work on Criminal Law, speaking of this constitutional provision, says the construction of these words is, that properly the rule extends to treason and all felonies, not to misdemeanors. Yet practically and wisely the courts have applied it to misdemeanors; and that in view of the liberal construction of statutes and constitutions in favor of persons charged with crime, he cannot well see how courts can refuse to apply this constitutional guaranty in cases of misdemeanor. 1 Bishop on Criminal Law, §§ 990, 991, 5th edition.

Chitty also drops the words "life and limb," in speaking of the pleas of *autrefois acquit* and *autrefois convict*, and declares that they both depend on the principle that no man shall more than once be placed in peril of

legal penalties upon the same accusation. 1 Chitty's Criminal Law, 452–462.

If we reflect, that at the time this maxim came into existence, almost every offence was punished with death or other punishment touching the person, and that these pleas are now held valid in felonies, minor crimes, and misdemeanors alike, and on the difficulty of deciding when a statute under modern systems does or does not describe a felony when it defines and punishes an offence, we shall see ample reason for holding that the principle intended to be asserted by the constitutional provision must be applied to all cases where a second punishment is attempted to be inflicted for the same offence by a judicial sentence.

For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that will legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?

The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.

But there is a class of cases in which a second trial is had without violating this principle. As when the jury fail to agree and no verdict has been rendered (*United States* v. *Perez*, 9 Wheaton, 579); or the verdict set aside on motion of the accused, or on writ of error prosecuted by him (*Casboris* v. *People*, 13 Johns, 351); or the indictment was found to describe no offence known to the law.

And so it is said that the judgment first rendered in the present case being erroneous must be treated as no judgment, and, therefore, presenting no bar to the rendition of a valid judgment. The argument is plausible but unsound. The power of the court over that judgment was just the same, whether it was void or valid. If the court, for instance, had rendered a judgment for two years' imprisonment, it could no doubt, on its own motion, have vacated that judgment during the term and rendered a judgment for one year's imprisonment; or, if no part of the sentence had been executed, it could have rendered a judgment for two hundred dollars fine after vacating the first. Nor are we prepared to say that if a case could be found where the first sentence was wholly and absolutely void, as where a judgment was rendered when no court was in session, and at a time when no term was held — so void that the officer who held the prisoner under it would be liable, or the prisoner at perfect liberty to assert his freedom by force, whether the payment of money or imprisonment under such an order would be a bar to another judgment on the same conviction. On this we have nothing to say, for we have no

such case before us. The judgment first rendered, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and of the offence, on a valid verdict. The error of the court in imposing the two punishments mentioned in the statute, when it had only the alternative of one of them, did not make the judgment wholly void. *Miller* v. *Finkle*, 1 Parker Criminal R. 874, is directly in point. But we think that no one will contend that the first sentence was so absolutely void that an action could be maintained against the marshal for trespass in holding the prisoner under it.

The petitioner, then, having paid into court the fine imposed upon him of two hundred dollars, and that money having passed into the treasury of the United States, and beyond the legal control of the court, or of any one else but the Congress of the United States, and having, also, undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and, without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him twice for the same offence. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing.

The force of this proposition cannot be better illustrated than by what occurs in the present case if the second judgment is carried into effect. The law authorizes imprisonment not exceeding one year or a fine not exceeding two hundred dollars. The court, through inadvertence, imposed both punishments, when it could rightfully impose but one. After the fine was paid and passed into the treasury, and the petitioner had suffered five days of his one year's imprisonment, the court changed its judgment, by sentencing him to one year's imprisonment from that time. If this latter sentence is enforced it follows that the prisoner in the end pays his two hundred dollars fine and is imprisoned one year and five days, being all that the first judgment imposed on him, and five days' imprisonment in addition. And this is done because the first judgment was confessedly in excess of the authority of the court.

But it has been said that, conceding all this, the judgment under which the prisoner is now held is erroneous, but not void; and as this court cannot review that judgment for error, it can discharge the prisoner only when it is void.

But we do not concede the major premise in this argument. A judgment may be erroneous and not void, and it may be erroneous because it is void. The distinctions between void and merely voidable judgments are very nice, and they may fall under the one class or the other as they are regarded for different purposes.

We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish farther was gone; that the principle we have discussed then interposed its shield, and forbade that he should be punished again for that offence. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offence, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offence, and had suf-

fered five days imprisonment on account of the other. It thus showed the court that its power to punish for that offence was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist.

It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offence under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or if on an indictment for treason the court should render a judgment of attaint, whereby the heirs of the criminal could not inherit his property, which should by the judgment of the court be confiscated to the state, it would be void as to the attainder, because in excess of the authority of the court, and forbidden by the Constitution.

A case directly in point is that of *Bigelow* v. *Forrest*, 9 Wall. 339. In that case, under the confiscation acts of Congress, certain lands of French Forrest had been condemned and sold, and Bigelow became the holder of the title conveyed by those proceedings. After Forrest's death his son and heir brought suit to recover the lands, and contended that under the joint resolution of Congress, which declared that condemnation under that act should not be held to work a forfeiture of the real estate of the offender beyond his natural life, the title of Bigelow terminated with the death of the elder Forrest.

In opposition to this it was argued that the decree of the court confiscating the property in terms ordered all the estate of the said Forrest to be sold, and that though this part of the decree might be erroneous, it was not void. Here was a case of a proceeding *in rem*, where the property was within the power of the court, and its authority to confiscate and sell under the statute beyond question; but the extent of that power was limited by the statute. The analogy to the case before us seems almost perfect. In that case the court said: "It is argued, however, on behalf of the plaintiff in error, that the decree of confiscation of the district court of the United States is conclusive; that the entire right, title, and interest of French Forrest was condemned and ordered to be sold; and that as his interest was a fee simple that entire fee was confiscated and sold. Doubtless, a decree of a court having jurisdiction to make the decree cannot be impeached collaterally; but under the act of Congress the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest. Had it done so it would have transcended its jurisdiction."

The doctrine of that case is reaffirmed in the case of *Day* v. *Micou* at

the present term, where it is said that in *Bigelow* v. *Forrest* "we also determined that nothing more was within the jurisdiction or judicial power of the district court than the life estate, and that consequently a decree condemning the fee could have no greater effect than to subject the life estate to sale."

But why could it not? Not because it wanted jurisdiction of the property or of the offence, or to render a judgment of confiscation, but because in the very act of rendering a judgment of confiscation it condemned more than it had authority to condemn. In other words, in a case where it had full jurisdiction to render one kind of judgment, operative upon the same property, it rendered one which included that which it had a right to render, and something more, and this excess was held simply void.

The case before us is stronger than that, for unless our reasoning has been entirely at fault, the court in the present case could render no second judgment against the prisoner. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the Constitution, and by the dearest principles of personal rights which both of them are supposed to maintain.

There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of a fundamental law in which they are embodied. Without straining either the Constitution of the United States, or the well settled principles of the common law, we have come to the conclusion that the sentence of the circuit court under which the petitioner is held a prisoner was pronounced without authority, and he should therefore be discharged. And it is so ordered.

Mr. Justice CLIFFORD and Mr. Justice STRONG dissented.

SUPREME COURT OF PENNSYLVANIA.

[MARCH, 1874.]

CRIMINAL LAW. — INTOXICATION AND EXCITEMENT AS AFFECTING THE INTENT IN MURDER CASES.

JONES v. THE COMMONWEALTH.

While intoxication cannot excuse crime, it may be sufficient to prevent a conviction of murder in the first degree.

Where it was shown that the accused had been taking laudanum and drinking to excess for several days previous to the killing, which, with other causes, had produced a disordered state of mind, and the killing took place during an altercation, the crime was held to be murder in the second degree.

THE facts are fully stated in the opinion, towards its conclusion.

AGNEW, C. J. delivered the opinion of the court.

In this case, if we confine our attention to the weapon, its previous prep-

aration, the threat proved by Mr. Crooks, the time for deliberation, and the circumstances of the killing of Mrs. Hughes by the prisoner, we might conclude that his crime was murder in the first degree. In this aspect the learned judge of the oyer and terminer had sufficient evidence to justify his finding of the degree. But ample time for reflection may exist, and a prisoner may seem to act in his right mind, and from a conscious purpose; and yet causes may affect his intellect, preventing reflection, and hurrying onward his unhinged mind to rash and inconsiderate resolutions, incompatible with the deliberation and premeditation defining murder in the first degree. When the evidence convinces us of the inability of the prisoner to think, reflect, and weigh the nature of his act, we must hesitate before we pronounce upon the degree of his offence. That reasonable doubt which intervenes to prevent a fair and honest mind from being satisfied that a deliberate and premeditated purpose to take life existed, should throw its weight into the scale to forbid the sentence of death.

Intoxication is no excuse for crime; yet when it so clouds the intellect as to deprive it of the power to think and weigh the nature of the act committed, it may prevent a conviction of murder in the first degree. The intent to take life, with a full and conscious knowledge of the purpose to do so, is the distinguishing criterion of murder in the first degree; and this consciousness of the purpose of the heart is defined by the words deliberately and premeditately.

Much has been said upon the meaning of these words, some of which may mislead, if we do not consider well the cases in which it has been uttered. In *The Commonwealth* v. *O'Hara*, tried in 1797, Chief Justice McKean said: "What is the meaning of the words deliberately and premeditately? The first implies some degree of reflection. The parties must have time to frame the design. The time was very short — it cannot be said to be done coolly. The legislature must have put a different construction on the words deliberately and premeditately. If he had time to think, then he had time to think he would kill. If you are of opinion he did it deliberately, with intention to kill, it is murder in the first degree. If he had time to think, and did intend to kill, for a minute as well as an hour or a day, it is sufficient." The correctness of this charge to the jury will not be doubted, if we examine the circumstances, and yet this is essential to understand it properly. O'Hara was a journeyman shoemaker, sitting on his bench at work with Haskins and others. Aitkins, the deceased, his friend, came up stairs, and said to him: "I have been talking about you below this hour." "Yes," said Haskins, "about the five sheep you stole." Thereupon O'Hara *immediately* left his work upon the bench, took up a shoemaker's knife by his side, went up to Aitkin's, and stabbed him in the belly. The act was not thoughtless, for the prisoner had time to lay down his work, take up the knife, rise and walk up to his friend, and to strike him in a vital part with an instrument of death. Upon every principle of human action we must conclude, under these circumstances, that O'Hara intended to take Aitkin's life; otherwise the thoughts of men never can be determined from clear and distinct acts evidencing the purpose of the mind. There was irritation, it is true, heightened by the previously existing story

about the sheep; but it was without any just cause of provocation to take life, and, therefore, evidenced a heart malignant, and ready to execute vengeance even upon a friend, in a moment of wicked passion. In such a case, a moment was sufficient to form and deliberate upon the purpose to take life, and premeditate the means of executing it. But these words of the chief justice are sometimes wrested from their application, and applied to cases where reason has been torn up by the roots, and judgment jostled from her throne.

Another case often quoted and misapplied is that of *Richard Smith*, tried before Judge Rush, in 1816. Smith had become intimate with the wife of Captain Carson, and had a difficulty with him in his own house. He returned with Mrs. Carson, and went with her up into the parlor. Carson came up unarmed, and ordered him to leave. Smith had armed himself, and held one hand under his surtout, and the other in his breast. Carson told Smith he had come to take peaceable possession of his own house, and the latter must go. Smith said to Mrs. Carson, "Ann, shall I go?" She replied, "No." Smith moved into the corner of the room, Carson following him, and telling him he must go, at the same time letting his arms fall by his side, and saying he had no weapon. Upon this, Smith drew a pistol from under his surtout, and shot Carson through the head, threw down the pistol, and ran down stairs. In this state of the facts, Judge Rush, charging upon the subject of deliberation, said: "The truth is, in the nature of the thing, no time is fixed by the law, or can be fixed for the deliberation required to constitute the crime of murder." Speaking, then, of premeditation, he says: "It is equally true, both in fact and from experience, that no time is too short for a wicked man to frame in his mind the scheme of murder, and to contrive the means of accomplishing it." We cannot doubt the correctness of these remarks in the case in which they were made, but cases often arise where this readiness of intent to take life, when imputed, may do great injustice. Hence it was said in *Drum's case*, 8 P. F. Smith, 16: "This expression (of Judge Rush) must be qualified, lest it mislead. It is true, that such is the swiftness of human thought, no time is so short in which a wicked man may not form a design to kill, and frame the means of executing his purpose; yet this suddenness is opposed to premeditation, and a jury must be well convinced upon the evidence that there was time to deliberate and premeditate. The law regards, and the jury must find the actual intent, that is to say, the fully formed purpose to kill, with so much time for deliberation and premeditation as to convince them that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design. If there be time to frame in the mind fully and consciously the intention to kill, and to select the weapon or means of death, and to think and know beforehand, though the time be short, the use to be made of it, then there is time to deliberate and premeditate." This was said in the case of a sudden affray, where the circumstances made it a serious question whether the act was premeditated, or was the result of sudden and rash resentment.

Thus we must perceive, that at the bottom of all that has been said on the subject of murder in the first degree is the frame of mind in which

the deadly blow is given — that state of mind which enables the prisoner either to know and be fully conscious of his own purpose and act, or not to know. Why is insanity a defence to homicide? Because it is a condition of the mind which renders it incapable of reasoning and judging correctly of its own impulses, and of determining whether the impulse should be followed or resisted. Intelligence is not the only criterion, for it often exists in the madman in a high degree, making him shrewd, watchful, and capable of determining his purpose, and selecting the means of its accomplishment. Want of intelligence, therefore, is not the only defect to moderate the degree of offence; but with intelligence there may be an absence of power to determine properly the true nature and character of the act, its effect upon the subject, and the true responsibility of the actor; a power necessary to control the impulses of the mind, and prevent the execution of the thought which possesses it. In other words, it is the absence of that self-determining power, which in a sane mind renders it conscious of the real nature of its own purposes, and capable of resisting wrong impulses. When this self-governing power is wanting, whether it is caused by insanity, gross intoxication, or other controlling influence, it cannot be said truthfully that the mind is fully conscious of its own purposes, and deliberates or premeditates in the sense of the act describing murder in the first degree. We must, however, distinguish this defective frame of mind from that wickedness of heart which drives the murderer on to the commission of his crime, reckless of consequences. Evil passions do often seem to tear up reason by the root, and urge on to murder with heedless rage. But they are the outpourings of a wicked nature, not of an unsound or disabled mind. It becomes necessary, therefore, to inquire upon the evidence in this case, whether the prisoner was really able to deliberate and premeditate the homicide.

William S. Jones had been upon bad terms with his wife. She had become too intimate with another Jones, called Charley. William S. Jones failing to break off the association got to drinking hard, and finally, after another quarrel with his wife on the 10th of June, 1871, attempted suicide by taking a large quantity of laudanum. Dr. Davis found him lying on a lounge partly insensible, eyes nearly closed, pupils contracted, and face discolored by congestion. Energetic remedies were used, and he was so far restored as to be out of danger, but the effects of the laudanum remained. From this time until the night of the 19th of June, when he took the life of Mrs. Hughes, his mother-in-law, he was in a constant state of nervous excitement, continued drinking, and had bottles of laudanum about his person. Many witnesses describe him as without sense, constantly talking nonsense, wild in appearance, and incoherent in speech. Some say he acted like a man drinking hard, was intoxicated, and once fell from a house. Others described him as looking crazy, talking to himself, his hands going, his head thrown back, walking to and fro, throwing his head about, swinging his arms, and wild, nervous, and excited. He would jump upon a chair and begin to preach, and run off upon Charley Jones and his wife; said he was going to build a tavern on the mountain, and a church beside it; claimed all the property about, and was evidently much out of the way. These appearances were particularly noticed on the 19th day of June, the day of the homicide. He was then on very

bad terms with his wife, yet seeking her and remonstrating with her, and on the afternoon of that day he had beaten and abused her, chasing her down stairs and into the street, and there striking and kicking her until separated by others. He continued in this condition down into the night of the 19th, when he came to Mrs. Hughes's house, between nine and ten o'clock. Stepping inside of the door, he asked Mrs. Hughes if the fuss was settled; said he had come down to settle it. She rose and told him to go away; told Lizzie to fetch a poker; said she would strike him, if he did not go away. He stepped back. She picked up a stool, and told him if he did not go away she would level him with it. He said, "I'll level you now," pulled out a pistol, stepped forward and shot her. Mrs. Hughes twice exclaimed, "I am shot," and went back into the kitchen, while Jones was seized by the persons present, and the pistol wrested from his hand. Between him and Mrs. Hughes there had been a state of good feeling, before he took the laudanum, and she attended him upon the day when he was under its influence. He spoke of her as his best friend. His conduct toward his wife, her daughter, had led Mrs. Hughes to resent it, and some feeling had arisen on the part of Jones, but after his arrest, he said he took the pistol to kill his wife, and the old woman had got it. Looking then at the state of Jones's mind from the 10th until the 19th of June, and down to the very moment he fired the pistol, and also, at the suddenness of his quarrel with Mrs. Hughes, her call for the poker, and lifting the stool, it seems to us a matter of grave doubt whether his frame of mind was such that he was capable either of deliberation or premeditation. It appears to have been rather the sudden impulse of a disordered brain, weakened by potations of laudanum and spirits, and of a distorted mind, led away from reason and judgment by dwelling upon the conduct of his wife, influenced by his continued state of excitement. It presents a case of a preparation of a weapon, and an undefined purpose of violence to some one, where the time for reflection was ample; but where the frame of mind was wanting which would enable the prisoner to be fully conscious of his purpose, or to resolve to take the life of the deceased, with deliberation and premeditation. Yet it was clearly murder, done without sufficient provocation, and without necessity, and in a frame of mind evincing recklessness and that common law malice which distinguishes murder from manslaughter.

There was error, therefore, in ascertaining the degree, and sentencing to death.

The judgment of the court of oyer and terminer of Luzerne County is reversed, and this court proceeding now to determine, upon the same evidence, the degree of the crime whereof the said William S. Jones is convicted by his own confession, now finds and declares that the crime of the said William S. Jones is murder in the second degree, and gives judgment accordingly; and forasmuch as the said William S. Jones is confined in the public jail of Luzerne County, distant herefrom, it is further ordered that the record, together with this finding and judgment, be remitted to the said court of oyer and terminer of Luzerne County, with a direction to the judges thereof to proceed to pronounce sentence upon the said William S. Jones, as for murder in the second degree, according to law, and for such term of imprisonment at labor as they, the said judges, shall adjudge to be a fit and proper punishment for his said offence.

DISTRICT COURT U. S. — DISTRICT OF OREGON.

[MARCH, 1874.]

COSTS IN UNITED STATES COURTS IN ACTIONS AT LAW.

ETHRIDGE v. *JACKSON.*

In the United States courts the statute of Gloucester governs the question of costs in actions at law unless a different rule has been prescribed by statute.

Section 20 of the act of 1853 (10 Stat. at Large, 161) specifies what items of cost may be taxed in favor of the prevailing party in cases where by a state law such party is entitled to recover costs, but, impliedly, denies costs to the losing party in any case; and, therefore, a state law which gives costs of course to the defendant when the plaintiff is not entitled to them, does not apply to actions in the courts of the United States.

DEADY, J. This action was brought to recover $475 for the wrongful conversion, by the defendants, of seven hundred and fifty bushels of oats and the sacks containing them. It was tried by a jury and a verdict given for the defendants. On a motion for a new trial, the court made an order setting aside the verdict and ordering a new trial, unless the defendants consented to the entry of a verdict for the plaintiff, for the wrongful conversion of sixty bushels of said oats, and thirty of said sacks, of the aggregate value of $27. The defendants consented and the verdict was so entered. Thereupon the plaintiff moved for judgment on the verdict *with costs*, to which the defendants objected, and moved that judgment be given them for costs, because the verdict was for less than $50.

At common law, costs were not given to either party. By 6 Edward I. c. 1, commonly called the statute of Gloucester, costs were given in all cases to the party recovering damages, *de incremento*, as an increase, or increment of the judgment.

The act of February 26, 1853 (10 Stat. 161), provides what attorneys' fees and items of expense are taxable as costs in the national courts. *Dedekam* v. *Vose*, 3 Bl. C. C. 153; *Parker* v. *Bigler*, 1 Fish. 285; *Lyell* v. *Miller*, 6 McLean, 422; *The Baltimore*, 8 Wall. 388.

The statute of Gloucester is considered a part of the law which our ancestors brought to this country from England, and is in force here and governs the question who is entitled to costs in this case, unless a different rule has been prescribed by statute. *Hathaway* v. *Roach*, 2 W. & M. 63. There is no act of Congress which *directly* declares which party is entitled to recover costs, except in a few special cases of which this is not one.

In *Hathaway* v. *Roach*, *supra*, decided in 1845, it was held that by force of section 34 of the judiciary act the law of the state applied and governed the question of costs generally.

In May, 1842, Mr. Justice Nelson delivered an "opinion," reported in Appendix to 1 Bl. C. C. 652, in which he held that the right of the prevailing party to recover costs is recognized by the judiciary act, but the rule as to what items were taxable was the one prescribed by the state statute. But in the course of the opinion it is assumed, in opposition to

the opinion in *Hathaway* v. *Roach*, that the question is one to be governed by the laws regulating the *practice and proceedings* of the court rather than section 34 of the judiciary act, which furnishes the rule of decision in common law cases.

By section 5 of the act of June 1, 1872 (17 Stat. 197), it is provided that "The *practice*, *pleadings* and *forms*, and *modes of proceedings*" in common law actions, in the United States courts, "shall conform" to that of the states where they are held. If the question of who is entitled to costs in a particular case is a question of practice, — certainly it is not one of pleading or form or mode of proceeding, — then, according to the opinion of Mr. Justice Nelson, *supra*, the subject is regulated by the law of the state.

But I think that the giving or withholding costs in a particular case is not a mere matter of practice. Costs are of the substance of the controversy and not the form. They are a part of the judgment and affect the *right of the party* as well as the recovery of the principal sum or thing. Therefore, I agree with Mr. Justice Woodbury in *Hathaway* v. *Roach*, *supra*, that the subject of who shall recover costs in a common law action is within the purview of section 34 of the judiciary act, which provides: "The laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as *rules of decision* in trials at common law, in the courts of the United States, in cases where they apply."

The cases upon this subject are meagre and not satisfactory or in accord. In my judgment, it is clear that the *right* to costs in this action — not the mere mode of taxing them or enforcing such right — depends upon the law of this State, because section 34 of the judiciary act makes such law *the rule of decision* herein, — the rule by which the rights of the parties are ascertained and measured in respect to all matters which enter into and form a part of the judgment or are determined by it.

Substantially, section 539 of the Oregon Code provides that in an action of this kind the plaintiff shall not be allowed costs unless he recover $50 or more; or unless "a claim of title or interest in real property or right to the possession thereof arises from the pleadings, or is certified by the court to have come in question upon the trial. Section 541 enacts that "Costs are allowed of course to the defendant in the actions mentioned in section 539, unless the plaintiff be entitled to costs therein."

Unless, then, "a claim of title or interest in real property or right to the possession thereof arises upon the pleadings" in this case, it is plain that the plaintiff cannot recover costs.

The only allegations upon which it is claimed that any such question could arise are the following: —

1. The adjudication in bankruptcy against A. J. Fleming. 2. The appointment of plaintiff as his assignee. 3. The execution of the deed of assignment to plaintiff. 4. The recording of the same. 5. The ownership of the real property upon which the oats in question were grown, by Fleming. 6. The entry and taking possession of the property by the plaintiff.

The fifth of said allegations is admitted, and thereby the defendants admit that the title to the real property was in the bankrupt at the time

of the adjudication and thereafter in the plaintiff, if, as he alleges, he is the duly qualified assignee.

The other five of said allegations are denied by the answer. Counsel for plaintiff maintains that such denials, taken together, amount to a denial of the plaintiff's title or right to the possession of the real property upon which the oats were grown, and upon which title or right he based his property in the oats.

The denial of the sixth of said allegations only raises the question of *fact*, — Did the plaintiff enter and take possession of the premises? No question of *title* or *right* to the possession of the property is involved in that allegation. *Pollock* v. *Cummings*, 38 Cal. 683; *Ehle* v. *Quackenboss*, 6 Hill, 537; *Muller* v. *Bayard*, 15 Abb. Pr. R. 449; *Burnett* v. *Kelly*, 10 How. Pr. R. 406; *Rathbone* v. *McConnell*, 20 Barb. 311.

The other four allegations taken together simply allege in effect that the plaintiff was the duly qualified assignee of Fleming, in bankruptcy, and therefore entitled to maintain this action for the wrongful conversion of his property by the defendants.

Indeed, there was no necessity of alleging in detail the adjudication, the appointment of assignee, the assignment, and the record thereof. As in the case of an executor or administrator, it was only necessary to state: "Ethridge, assignee of the estate of Fleming, a bankrupt (or duly adjudged a bankrupt), according to the statute in such case made and provided, complains of Jackson and Imbrie: For that," &c.

A "claim of title or interest in real property, or right to the possession thereof," cannot be said to arise "upon the pleadings," unless such claim or right is averred therein upon the one side and denied upon the other. *Jackson* v. *Randal*, 11 Johns. 405.

Section 20 of the act of 1853, *supra*, provides, that "The bill of fees of clerk, marshal, and attorneys, and the amount paid printers and witnesses, and lawful fees for exemplification and copies of papers necessarily obtained for use on trial, 'in cases where by law costs are recoverable in favor of the prevailing party,' shall be taxed by a judge or clerk of the court, and be included in and form a portion of the judgment or decree against the losing party."

The rule which prescribes in what cases "costs are recoverable in favor of the prevailing party" is the law of the State above cited. But who is to be considered the "prevailing party" within the meaning of this section?

In a general sense, the prevailing party in an action is the one for whom judgment is given concerning the matter or thing in controversy. In that sense the prevailing party in this case is the plaintiff, for he is entitled to judgment upon the merits for $27. Still, by the state law, costs are not recoverable by him because his damages are less than $50. Nor do I think the defendants are entitled to costs. In this case section 541 of the Oregon Code, which gives costs, of course, to the defendant in an action, unless the plaintiff is entitled to them, does not "apply," because "a statute of the United States" otherwise provides. Section 20, *supra*, only gives costs to the prevailing party. They are to be "included in and form a portion of the judgment or decree against the losing party." The right of the losing party to costs is not recognized, but impliedly

denied. These provisions are inconsistent with the idea that there may be a judgment for the plaintiff upon the merits and for the defendants for costs, as implied in section 541 of the Oregon Code.

In conclusion: 1. In the absence of any act of Congress to the contrary, the party recovering damages in this court is entitled, by virtue of the statute of Gloucester, to recover costs without reference to the amount of such damages. 2. By virtue of section 34 of the judiciary act, section 539 of the Oregon Code, which in effect denies costs to the plaintiff in an action of trover, when he recovers less than $50, is applicable to this action. 3. Section 20 of the act of 1853, *supra*, specifies what items of cost may be taxed in favor of the prevailing party in cases where, by the Oregon Code, such party is entitled to recover costs, but impliedly denies costs to the losing party in any case, and therefore section 541 of the Oregon Code, which gives costs, of course, to the defendant when the plaintiff is not entitled to them, does not apply to actions in the United States courts.

Let judgment be entered on the verdict for the plaintiff without costs to either party.

John A. Woodward, for plaintiff.

Walter W. Thayer, for defendant.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1873.]

BANKRUPTCY. — SURETY UPON BOND OF U. S. OFFICIAL NOT RELEASED BY DISCHARGE. — CONSTRUCTION OF STATUTES.

UNITED STATES v. *HERRON.*

The sovereign is not bound by an enactment that divests its interest or affects its rights, title, or prerogatives, unless expressly included within the terms of the law. Hence, a discharge in bankruptcy, under the U. S. statute, does not include liability as surety upon a bond for the performance of duty by an official of the United States.

General discussion of the requirements of the bankrupt act by Mr. Justice CLIFFORD.

MR. Justice CLIFFORD delivered the opinion of the court.

Proceedings in bankruptcy are deemed to be commenced from the filing of the petition in bankruptcy, either by a debtor in his own behalf or by any creditor against a debtor; and if it appear to the court that the bankrupt has in all things conformed to the requirements of the bankrupt act, it is made the duty of the court to grant him a certificate under the seal of the court, that he be forever discharged from all debts and claims that by said act are provable against his estate, which existed on the day the petition for adjudication was filed, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy. 14 Stat. at Large, 533.

With the exception of the debts specified in the thirty-third section, the act provides that a discharge duly granted under the act shall release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy.

Collectors of internal revenue taxes are required by law to give bond for the faithful discharge of their duties, and the record shows that Lewis B. Collins, having been duly appointed to that office for the Third District of Louisiana, gave the required bond, and that the present defendant was one of his sureties. Default having been made by the principal the United States brought an action of debt on his official bond, joining all the sureties with the principal.

They alleged two breaches, as follows: (1) That the principal did not pay over all the public moneys he received for the use and benefit of the plaintiff. (2) That he did not do and perform all such acts and things as were required of him by the treasury department.

Service was made, and the defendant appeared and pleaded, as a peremptory exception, that on the thirtieth day of May, 1868, he filed his petition in the district court to be adjudged a bankrupt, and that the court, on the eighteenth of January following, in due course of law, granted him a discharge under the provisions of the bankrupt act, in the words and figures set forth in the record, which, as he alleges, is a full and complete bar to the plaintiff's demand. Hearing was had, and the court awarded judgment for the defendant, and the plaintiffs sued out a writ of error and removed the cause into this court. Since the case was entered in this court, the plaintiff assigned for error that a discharge under the bankrupt law does not bar a debt due the United States.

1. Debts created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, are not discharged by the certificate required to be given to the bankrupt by the thirty-second section of the bankrupt act, nor will any such certificate release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise. Such debts, that is, debts created by the fraud and embezzlement of the bankrupt, or by his defalcation as a public officer, or as a fiduciary agent, may be proved, and the dividend thereon, it is provided, shall be a payment on account of the said debt; but the provision that no such certificate shall release, discharge, or affect any person liable for the same debt, for or with the bankrupt as surety, does not apply to this case, as it is *the surety* here who pleads the certificate of discharge, and not *the principal* in the bond set forth in the declaration. 14 Stat. at Large, 533; *U. S.* v. *Davis*, 3 McLean, 483.

Instead of that, the question presented by the assignment of error in this court must depend upon other provisions of the bankrupt act, when properly construed, in view of the settled rule of construction that the sovereign authority of the country is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights, or interests of the sovereign. *Anonymous*, 1 Atk. 262; *Rex* v. *Earl*, Bunbury, 32; *Rex* v. *Pixley*, Ib. 201.

When an act of parliament is made for the public good, as for the advancement of religion and justice, or to prevent injury and wrong, the

king is bound by such act, though not particularly named therein; but where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king is not bound, unless the statute is made to extend to him by express words. 8 Bac. Ab., by Bouv., Prerog., E. 5; *U. S.* v. *Knight*, 14 Pet. 301.

Acts of parliament, says Chitty, which would divest or abridge the king of his prerogatives, his interest, or *his remedies*, in the slightest degree, do not in general extend to or bind the king, unless there be express words to that effect. Therefore, says the same learned author, the statutes of limitation, bankruptcy, insolvency, set-off, &c., are irrelevant in the case of the king, nor does the statute of frauds relate to him, which last proposition is doubted by high authority. Chitty on Prerogative, 383; 19 Vin. Abt., Stat., E. 10.

Exceptions exist to that rule undoubtedly, as where the statute is passed for the general advancement of learning, morality, and justice, or to prevent fraud, injury, and wrong, or where an act of parliament gives a new estate or right to the king, as in that case it will bind him as to the manner of enjoying or using the estate or right as well as the subject.

Debts due to the United States, it is expressly provided, shall be entitled to preference or priority over all other claims, except the claims for fees, costs, and expenses of suits, and other proceedings under the bankrupt act, and for the custody of the bankrupt's property.

Five classes of claims are recognized as claims entitled to priority or preference by the twenty-eighth section of the bankrupt act, and the provision is that they shall "be first paid in full in the following order:" First, fees, costs, and expenses; second, all debts due to the United States and federal taxes and assessments; third, all debts due to the state in which the proceedings in bankruptcy are pending, and all state taxes and assessments; fourth, wages due to any operative, clerk, or house servant to an amount not exceeding fifty dollars, for labor performed within the period therein specified; fifth, all debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if the act had not been passed.

Attempt is made in argument to show that the preference given to debts of the United States does not exclude such debts from the operation of the certificate of discharge, because such debts are not named in the proviso annexed to the description of the fifth class of claims entitled to priority and full payment in preference to general creditors; but the court is not able to concur in that proposition, as it is quite clear that the proceedings in bankruptcy would very much embarrass tax-collectors without some saving clause in that behalf, and to that end it was provided that "nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any state." Consequently taxes, whether federal or state, may be collected in the ordinary mode; but if not collected and the property of the bankrupt passes to and is administered by the assignee, the taxes are then entitled to the priority and preference provided in the same section of the bankrupt act. Nothing, therefore, can be inferred from that proviso inconsistent with the proposition that the sovereign authority is not bound by the provisions of the bankrupt act, unless therein named.

Confessedly the United States is not named in any of the provisions of the act providing for the discharge of the bankrupt from his debts, nor in any of the required proceedings which lead to that result, unless it can be held that the sovereign authority, having debts against the bankrupt, is included in the word "creditor or creditors," as used many times in the several sections of the bankrupt act. Examples of the kind are numerous, of which the following are some of the most material: —

Persons applying for the benefit of the bankrupt act are required to annex a schedule to the petition, verified by oath, containing a full and true statement of all their debts, and, as far as possible, to whom due, with the place of residence of each creditor, if known to the debtor, and if not known the fact must be so stated, and the sum due to each, and the nature of each debt or demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause or consideration of such indebtedness in each case, and the place where such indebtedness accrued, and a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same.

Where the debts exceed three hundred dollars, it is the duty of the judge to issue a warrant, directed to the marshal, authorizing him to publish notices in such newspapers as the warrant specifies, and to serve written or printed notices on all creditors whose names are included in the schedule, or whose names may be given to him in addition by the debtor, and to give such personal or other notice as the directions of the warrant require. (1) That a warrant in bankruptcy has been issued against the estate of the debtor. (2) That the payment of any debts or the delivery of any property belonging to such debtor to him or the transfer of any property by him are forbidden by law. (3) That a meeting of the creditors of the debtor will be held at a court of bankruptcy, to be holden at the time designated in the warrant.

Due notice to the creditors in that regard is indispensable, as the provision is, that if it be not given, the meeting shall be adjourned and a new notice given as required. Assignees of the estate of the debtor are to be chosen by the creditors at their first meeting. Creditors not only appoint the assignee or assignees, but, in certain cases and under certain conditions, they may remove any assignee, and vacancies in certain cases may be filled by the creditors, as provided in the eighteenth section of the act. Debts due and payable from the bankrupt, at the time he is adjudged as such, and all debts then existing, but not payable until a future day, a rebate of interest being made, when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. Contingent debts and liabilities of the bankrupt may also be claimed by creditors, and such claims may be allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend. When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt. No creditor proving his debt shall be allowed to maintain any suit at law or in equity therefor against the bankrupt. Resident creditors are required to make proofs before one of

the registers of the court in the district where the proceedings are pending; but all such proofs, in behalf of non-resident creditors, may be made before a commissioner or before a register in the judicial district where the creditor resides, and corporations may verify their claims by the oath or affirmation of their president, cashier, or treasurer.

Claims against the estate of the bankrupt are required to be signed by the claimant and to be verified by his oath; and the requirement also is that the assignee shall register, in a book to be kept by him for the purpose, the names of the creditors who have proved their claims, in the order in which such proof is received, stating the time of its receipt, and the amount and nature of the debt. Claimants are forbidden to accept any preference; and the provision is, that if any one does so, contrary to the prohibition of the act, he shall not prove the debt or claim, nor shall he receive any dividend until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.

Preferences are forbidden in order that equal distribution may be effected; and the act provides that all creditors, whose debts are duly proved and allowed, shall be entitled to share in the bankrupt's property and estate *pro rata*, without any priority or preference whatever, except that wages due from the bankrupt to any operative, or clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the adjudication of bankruptcy, shall be entitled to priority and shall be first paid in full. Annexed to that clause there is also a proviso that any debt proved by any person liable as bail, surety, guarantor, or otherwise for the bankrupt, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable.

Just and true accounts are to be kept by the assignees, and they are to make full report of the same to the creditors at a meeting to be called for the purpose, and the creditors are to determine whether any and what part of the net proceeds of the estate shall be distributed as a dividend; and if the creditors order a dividend, it is made the duty of the assignee to prepare a list of the creditors entitled to the same, and to compute and set opposite to the name of each creditor the dividend to which he is entitled out of the net proceeds of the estate set apart for that purpose. Preparatory to the final dividend, the assignee shall submit his account to the court, and file the same and give notice to the creditors of such filing, and shall also give notice that he will apply for a final settlement of his account.

Application for a discharge from his debts may be made by the bankrupt, as provided in the twenty-ninth section of the act; and the provision is that the court shall thereupon order notice to be given to the creditors, as therein specified, to appear, on a day appointed for that purpose, and show cause why a discharge to the applicant should not be granted.

Insolvent debtors may also, in certain cases, be adjudged bankrupts on the petition of one or more of their creditors. Matters necessary to be alleged in such a petition are specifically set forth in the bankrupt act, which provides that if the facts alleged are found to be true the court shall forthwith make the required adjudication, and issue a warrant to

take possession of the estate of the debtor, which shall be directed as in the former case; and the property of the debtor shall be taken thereon, and be assigned and distributed in the same manner and with similar proceedings to those provided for taking possession, assignment, and distribution of the property of the debtor upon his own petition.

Sufficient appears from this summary of the proceedings required under the bankrupt act to establish two propositions beyond all doubt or cavil: (1) That the United States are not named in any of the provisions of the act except the one which provides that all debts due to the United States and all taxes and assessments under the laws thereof shall be entitled to priority or preference, as heretofore fully explained. (2) That many of the provisions describing the rights, duties, and obligations of creditors are in their nature inapplicable to the United States, and that if held to include the United States, could not fail to become a constant and irremediable source of public inconvenience and embarrassment.

Viewed in the light of these suggestions, and of the language employed in the act, the court is of the opinion that the words "creditor or creditors," as used in the several provisions of the bankrupt act, do not include the United States.

Twice before, since the federal Constitution was adopted, the Congress has enacted similar laws, and it is matter of history that the framework of those acts, as well as much of their details, was drawn from the various acts of parliament upon the same subject, and the remark is equally applicable to the principal features of the act under consideration, in respect to all the parts of the same, whose construction is involved in the case now before the court. Such acts of parliament have never, in terms, included debts due to the sovereign of the country; and the decisions of the courts of Westminster Hall, for more than a century, have held, without an exception, that such acts or the proceedings under the same do not discharge debts due to the crown. *Atty. Gen.* v. *Ashton*, 2 Mod. R. 248; *Anonymous*, 1 Atk. 262.

Text writers also, of the highest authority, have uniformly promulgated the same rule. Speaking of the order of discharge, Deacon says it does not release the bankrupt from a debt due to the crown; for as the crown is not bound by any statute unless specifically named, and crown debts not being mentioned among those of the creditors in general, in any part of the statute relating to the proof of debts or the certificate of discharge, the crown of course will not be barred of the peculiar privileges it possesses for the recovery of its own debts. 1 Deacon on B. (3d ed.) 784; *Rex* v. *Pixley*, Bunb. 202.

Nor does the bankrupt act impair or supersede the laws for the collection of taxes, and that rule also is founded upon the same canon of construction, to wit, that the crown is not bound by the bankrupt laws; and therefore, says Shelford, the appointment of assignees does not relate to the act of bankruptcy *as against the crown process*, but the bankrupt's personal property is bound under an extent even when tested subsequently to the appointment of the assignees. Shelford on B. 303. To which he adds, that the bankrupt's certificate is no discharge as against the crown. *Cranfurd* v. *Atty. Gen.* 7 Price, 1.

Such a certificate, says Robeson, will not release the bankrupt from any

debt or liability incurred by means of any fraud, nor from debts due to the crown, nor from debts with which the bankrupt stands charged *at the suit* of the crown, or of any person for any offence against a statute relating to any breach of the public revenue, or at the suit of the sheriff or other public officer, on a bail bond entered into for the appearance of any person prosecuted for any such offence. Robeson on B. (2d ed.) 553.

With a single exception, not material in this case, the views of Cooke are the same as those expressed by Shelford. He says the crown is not bound by the acts relating to bankrupts, not being named in them; therefore an extent served upon the property of the bankrupt will bind it from the test of the writ and until the actual assignment of the commissioners, but the king is bound by an actual assignment because the property is then absolutely transferred to a third person. Eden. on B. 143.

Different explanations have been given as to the reason of the rule in different adjudications, but perhaps there is none more satisfactory than the original one, that the sovereign is not bound by the act because not named as a creditor in any of its provisions. But the reason for the rule assigned in a recent decision in the exchequer chamber is also entitled to much consideration as supporting the original rule. Throughout the bankrupt acts the word creditor, says Mr. Justice Blackburn, is used in the sense of a person having a claim which can be proved under the bankruptcy; to which he might have added, and one not required by the act to be paid in full in preference of all other creditors. *Woods* v. *De Mattos*, 3 Hurlst. and Colt. 987.

Greater unanimity of decision in the courts or of views among text writers can hardly be found upon any important question than exists in respect to this question in the parent country; nor is there any diversity of sentiment in our courts, federal or state, nor among the text writers of this country.

Perhaps the earliest decision in this country was that given in the case *United States* v. *King*, Wallace C. C. 13, which was made at almost the beginning of the present century. In that case the question was directly presented and was as directly adjudicated, the court holding that debts due to the United States are not within the provisions of the bankrupt act. Other decisions of like character are found in the state reports.

It is a maxim of the common law, said Savage, Ch. J., that when an act of parliament is passed for the public good, as for the advancement of religion and justice, or to prevent injury and wrong, the king shall be bound by such act though not named; but when a statute is general, and any prerogative, right, title, or interest would be divested or taken from the king, in such a case he shall not be bound unless the statute is made by express words to extend to him, for which he cites both English and American authorities; and adds, that the people of the state, being sovereign, have succeeded to the rights of the former sovereign, and that the people of the state are not bound by the general words in the insolvent law. *People* v. *Herkimer*, 4 Cow. 345; see also *Com.* v. *Hutchinson*, 10 Barr, 466, which is to the same effect; Hilliard on B. (2d ed.) 295.

Sanctioned as that principle is by two express decisions of this court, it would seem that further discussion of it is unnecessary, as it has never been questioned by any well-considered case, state or federal, and is

found in the presumption that the legislature, if they intended to divest the sovereign power of any right, privilege, title, or interest, would say so in express words; and where the act contains no words to express such an intent, that it will be presumed that the intent does not exist. *U. S.* v. *Knight*, 14 Pet. 315; *Dollar Savings Bank* v. *U. S.*, decided at the present term; *U. S.* v. *Hoar*, 2 Mass. 311; *Com.* v. *Baldwin*, 1 Watts, 54.

Such a conclusion, to wit, that Congress intended that the certificate of discharge given to a bankrupt should include his liability as a surety for the faithful performance of duty by a public officer, ought not to be adopted unless such an intention is expressed in clear and unambiguous terms; as the rule, if established, would, in all probability, lead to great loss to the public treasury and to great public embarrassment. *Regina* v. *Edwards*, 9 Exch. 50.

Judgment reversed, and the cause remanded, with directions to issue a new *venire*.

COURT OF APPEALS OF VIRGINIA.

[TO APPEAR IN 24 GRATTAN.]

DECREE IN ABSENCE OF DEFENDANT. — JUDGMENT AND FRAUDULENT SALE THEREUNDER. — COMBINATION TO PREVENT COMPETITION AT JUDICIAL SALE.

UNDERWOOD v. *McVEIGH.*

In 1863 *proceedings were instituted in the district court of the U. S. at Alexandria, under an act of Congress, to confiscate the real estate of M. Before the condemnation, M. appeared by counsel and filed his answer, which afterwards, on the motion of the attorney for the U. S., was struck out; and the court, not allowing M. to appear in the cause, decreed that the property should be sold at auction by the marshal. This was done, and the property was conveyed by the marshal to the purchaser. Upon appeal by M. to the supreme court of the U. S., the decree was reversed. And when the case came back to the district court it was dismissed. In ejectment by M. against the purchaser, to recover the property: Held, the decree having been made in the absence of M. was a nullity, and the deed of the marshal passed no title to the purchaser.*

In proceedings by attachment against M., judgment is rendered against him, and there is an order for a sale, and a sale and conveyance to the purchasers, of the real estate attached. Held: 1. *The judgment and conveyance made under the judgment and order, by the sheriff, divested M. of his legal title to the property, unless the said sale was fraudulently made, and the confirmation thereof was procured by fraud, and that the purchaser was privy to such fraud, or had notice of the same, or of such circumstances as would put a prudent* bonâ fide *purchaser upon inquiry in respect thereto.*

2. *But if the purchaser combined with others to purchase the property at the attachment sale, at a sacrifice; and if, in pursuance of such combination, they so acted as to prevent competition at said sale, or to prevent the said property realizing a*

fair value, then such combination and action was fraudulent, and the deed of the sheriff passes no title to the purchaser.

3. *If evidence offered to be introduced on the trial of a cause is relevant to the issue, it should be admitted. It is for the jury to determine what effect it shall have.*

THE case is fully stated by Judge Christian, in his opinion.

Beach, for the appellant.

John Howard & Jones, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

This case is before us upon a writ of error and *supersedeas* to a judgment of the corporation court of the city of Alexandria.

The action was ejectment, brought by the defendant in error to recover of the plaintiff in error a house and lot in the said city of Alexandria; and also for damages and mesne profits for its occupation. There was a verdict for the defendant in error for the premises claimed; and the damages for mesne profits and damages for occupation were assessed at the sum of three thousand and eighty-one dollars, and a judgment was entered in accordance with the verdict. There was no motion for a new trial, and the facts proved are not certified. The legal questions submitted to this court are raised by certain instructions propounded by both plaintiff and defendant; and the bills of exception taken to rulings of the court, in granting or refusing these instructions, embody the evidence which was before the jury.

The evidence establishes the following facts: —

McVeigh was the owner in fee of the premises in controversy, and was in the actual possession of the same until the —— day of ——, 1861, when he removed to the city of Richmond, where he remained during the war.

On the 18th day of July, in the year 1863, certain proceedings were commenced by the district attorney of the United States for the Eastern District of Virginia, for the seizure of said property for confiscation, under the act of Congress entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." After a libel of information was filed, and notice thereof published, and before sentence of condemnation was entered by the said district court, McVeigh appeared by counsel, interposed a claim to the property, and filed his answer.

On the 10th March, 1864, the attorney of the United States submitted a motion that the appearance, answer, and claim of McVeigh be stricken from the files, for the reason that the respondent "was a resident of the city of Richmond, within the Confederate lines, and a rebel." And on the same day the following order was entered: "And now came on to be heard the motion of L. H. Chandler, attorney for the United States, libellants herein, to strike from the files the answer, claim, and appearance interposed by Messrs. Beach & Bradley for and in behalf of respondent, William N. McVeigh; and on motion of L. H. Chandler, the application of libellants is granted, and it is ordered that the answer and claim interposed in this suit by said Messrs. Beach & Bradley have been irregularly and improperly admitted on file in this cause, and that the same be stricken therefrom."

On the same day, to wit, on the 10th of March, 1864, after the order

was entered as above, striking from the files the appearance, answer, and claim of the respondent, the court entered its sentence and decree of condemnation of the property libelled; and it was on that same day adjudged and ordered, "that the real and personal property mentioned and described in the libel in this cause be, and the same accordingly is confiscated and condemned as forfeited to the United States." And it was on the same day ordered, that a decree of *venditioni exponas* be issued by the clerk of the court to the marshal of the district, directing him to sell the property upon twenty days' notice, and make return on the 16th April following.

On the last mentioned day (April 16th, 1864), which was the return day of the said *venditioni exponas*, issued under the above order, John Underwood, U. S. marshal, returned a deed between himself and Maria G. Underwood, who is the wife of John C. Underwood, judge of the district court of the United States for the Eastern District of Virginia, who as judge of said court entered all the orders above referred to; which deed, after reciting all the proceedings of confiscation above referred to, further recites: "And whereas, after due publication according to law, and the decree of said court, of the time, terms, and place of sale, the said property, on the 11th day of April, 1864, was sold to the said Mrs. Maria G. Underwood, the party of the second part, she being the highest bidder therefor, for the sum of twenty-eight hundred and fifty dollars: Now, therefore, the said John Underwood, as marshal as aforesaid, the party of the first part, in consideration of the premises and of the full payment of the said purchase money, the receipt whereof is hereby acknowledged, doth grant, bargain, sell, and convey unto the said Mrs. Maria G. Underwood, the party of the second part, her heirs, executors, administrators, and assigns, the following property, to wit." And then follows a particular description of the property conveyed by said deed, which is the same property which is the subject of controversy in the case now before this court.

The case was taken up on a writ of error from the district court to the circuit court, where the decree was affirmed, and then carried up to the supreme court of the United States. The supreme court pronounced its judgment at the December term, 1870, when that court reversed the decree of the said district court, and remanded the cause to be proceeded in, in conformity to law. Mr. Justice Swayne, delivering the unanimous opinion of the supreme court, said: "In our judgment the district court committed a serious error, in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order, in effect, denied the respondent a hearing. It is alleged that he was in the position of an alien enemy; and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." 11 Wall. 267.

It was accordingly ordered and adjudged by the supreme court of the United States, "that the judgment of the said circuit court in this cause be, and the same is hereby, reversed and annulled;" and the cause was

remanded to the said circuit court of the United States, for further proceedings to be had therein, in conformity with the opinion of the supreme court. The mandate of the supreme court was issued on the 6th of March, 1871, and on the 5th of April, 1871, the cause came on to be heard in the said circuit court, and the said libel was dismissed. Thus ended the proceedings in the case of libel for confiscation in United States courts.

Pending these proceedings in confiscation, sundry creditors of McVeigh (who was a member of a mercantile firm of the name and style of C. A. Baldwin & Co.), among them Francis Dane & Co., instituted suit against him, in the county court of Alexandria County, and attached all his interest in the same property which was the subject of the confiscation proceedings above referred to. Judgment was rendered against McVeigh in this suit, and an order was made to sell the attached property for the satisfaction of the judgment. On the 10th of May, 1864, it was accordingly sold by the sheriff of Alexandria County; and the house and lot now in controversy were conveyed by the sheriff to Maria G. Underwood, wife of John C. Underwood, who was the purchaser of the same property at the confiscation sale (the property at the attachment sale having been cried off to one John B. Alley, who assigned his purchase and directed the conveyance to be made to her).

The sale thus made by the sheriff of Alexandria, in the said attachment suit, was confirmed by the county court on the 6th of July, 1864; and the said sheriff was ordered to execute and deliver to the purchaser deeds for the property sold.

On the 6th day of October, 1865, the defendants in the attachment suit, McVeigh and Baldwin, appeared, and were permitted to file their petition. Whereupon, it was ordered, "that the same be reopened and docketed, and that they be permitted to make such defence to the judgment and order herein rendered as they might have done before said judgment and order were rendered, on giving security for costs." And then, by consent of parties, the case was removed to the circuit court of Alexandria. Upon a case agreed, in lieu of a special verdict, the following order and proceedings were entered and had in that court: "It appearing to the court that the petitioners, C. A. Baldwin & Co., have not been served with process or a copy of the judgment aforesaid, it is ordered and adjudged by the court that the judgments complained of be set aside and annulled. But as the purchasers are not before the court, the court declines making any order affecting their rights; reserving, however, to the petitioners, C. A. Baldwin & Co., the right to institute such other and further proceedings as they may be advised necessary to impeach or annul the titles claimed by such purchasers." The plaintiffs excepted to said order, "that the judgments complained of be set aside;" and it being admitted by the defendants that the claims for which the plaintiffs respectively recovered judgment against them, at the January term, 1864, of the county court of Alexandria County, were justly due by said defendants to the plaintiffs respectively, the plaintiffs, thereupon, moved the court to confirm said judgments of the county court for the amounts of said claims thereby respectively adjudged to the plaintiffs. But the court denied the motion; and to the ruling of the court, denying the motion, the plaintiffs excepted.

To this judgment of the circuit court of Alexandria a writ of *supersedeas* was obtained, which brought the case before the district court of appeals for the Fourth Judicial District, held at Fredericksburg. That court, on the 7th day of January, 1869, pronounced the following judgment: "This day came the parties, by their counsel; and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, that the defendant, William N. McVeigh, had an attachable interest in the estate on which the attachment in this case was levied; and that said attachment was not issued on false suggestions, or without sufficient cause. The court is therefore of opinion, that the said circuit court erred in overruling the motion of the plaintiffs to confirm the judgment of the county court of Alexandria County, recovered by the plaintiffs against the defendants, on the 5th day of January, 1864, and in setting aside and annulling said judgment. But the court is further of opinion, that as the evidence introduced by the said McVeigh, and mentioned in the opinion of the said circuit court, referred to in the judgment of said court, strongly tends to prove that the purchasers of the property sold under said attachment were not *bonâ fide* purchasers, the defendants are entitled to impeach the title of the said purchasers to the said property, either by a new suit to be instituted for that purpose, or by further proceedings in this cause, at their election. If they elect the former (a new suit), then the judgment in this cause should be without prejudice to their right to relief in any new suit they may be advised to institute. And the cause is remanded to the said circuit court, for further proceedings to be had therein, according to the principles above declared."

The circuit court, upon receiving the mandate of the district court of appeals, entered a judgment, confirming the judgment of the county court, in favor of the claim of the attaching creditors. And thus ended the proceedings in the attachment suits.

Acting under the judgment of the district court, authorizing the defendants to impeach the title of the purchasers of the property sold under the attachment, in a new suit to be instituted for that purpose, McVeigh brought his action of ejectment against John C. Underwood, for the house and lot purchased by Mrs. Maria G. Underwood, his wife, and of which they were and still are in possession.

It seems that Underwood and wife executed a deed, conveying this property to one Force, to be held by him in trust for the sole and separate use of the said Maria G. Underwood; and, upon his motion, he was made a party defendant to the action of ejectment. As before stated, there was a verdict and judgment in favor of McVeigh for the premises in controversy, and for a certain amount as damages and mesne profits; and a writ of error to that judgment brings up the case to this court.

In the petition for a writ of error, there are four assignments of error, which will now be considered seriatim, in the order in which they are propounded: —

I. The refusal of the court to grant the defendant's (plaintiff in error) first instruction.

II. The refusal of the court to grant the defendant's (plaintiff in error) second instruction.

III. The granting of the first instruction of the plaintiff (defendant in error).

IV. The granting of the second instruction of the plaintiff (defendant in error).

V. The admission of the depositions read in evidence by the plaintiff (defendant in error).

The first instruction asked for by the plaintiff in error was in these words: "That the said sentence and decree of condemnation, and the said sale and conveyance of the marshal, divested the plaintiff of his right, title, and interest in and to the premises in the declaration mentioned, for and during the natural life of the said plaintiff; and that as to said estate, for and during the natural life of the plaintiff in said premises, the jury must find for the defendants." This instruction the court refused to give; and the question is, whether this refusal was error. This instruction directly propounded the question to the court, as to how far a party can be held bound by a sentence of condemnation in proceedings in which he was not permitted to appear, and in which he had no opportunity to be heard. The court was asked to give this instruction, in the face of the record introduced by Underwood himself, as a muniment of his title, showing that he, as judge of the district court of the United States, had ordered "the appearance, answer, and claim" of McVeigh to be stricken from the files of his court; and then, after refusing him a hearing, on the same day enters an order of condemnation and sale; and, at the sale, becomes the purchaser (through his wife, upon whom he settles the property), at a grossly inadequate price. It is upon this record, offered by himself as a muniment of title, showing these pregnant facts, that he asks the court to charge the jury, that by the decree of condemnation and sale which he had entered, without a hearing, and refusing an appearance, McVeigh had been "divested of all his right, title, and interest in the premises, during his natural life; and that they must, therefore, find for the defendants." The court did not err in refusing the instruction. It would, on the contrary, have been gross error to have given it. The sentence of condemnation and sale was a nullity — void *in toto*. It was rendered absolutely void by the act of the court in refusing to permit McVeigh to appear and be heard. The authorities on this point are overwhelming, and the decisions of all the tribunals of every country where an enlightened jurisprudence prevails, are all one way. It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have the opportunity of being heard in defence, both in repelling the allegations of facts, and upon the matter of law; and no sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte* and without opportunity of defence. An examination of both sides of the question, and deliberation between the claims and allegations of the contending parties, have been deemed essentially necessary to the proper administration of justice by all nations, and in every stage of social existence. A tribunal which decides without hearing the defendant, or giving him an opportunity to be heard, cannot claim for its decrees the weight of a judicial sentence. See Smith's Leading Cases, vol. 1, part 2, ed. 1872, p. 1118–19–20, and the numerous cases there cited; and to these might be added, cases almost

without number. These principles, which form the very foundation of the common law, have been announced by the ablest and most distinguished jurists as maxims of natural justice and universal application: by Lord Brougham, when he said, in *Earl of Bandon* v. *Becker*, 3 Clarke & Fin. R. 479, 510, "You may at all times, in a court of competent jurisdiction, competent as to the subject matter of the suit itself — where you appear as an actor — object to a decree made in another court, upon which decree your adversary relies; and you may, either as actor or defender, object to the validity of that decree, — provided it was pronounced through fraud, contrivance, or covin of any description, or not in a real suit; or if in a real and substantial suit, *between parties who were really not in contest with each other;*" by Parke B., in *Chapel* v. *Child*, 2 Cr. & Jer. R. 558, when he declares that, "no judicial proceeding could deprive a man of any part of his property without giving him an opportunity of being heard;" by Judge Bronson, in *Bloom* v. *Burdick*, 1 Hill N. Y. R. 130–140, when he said "It is a cardinal principle in the administration of justice, that no man can be condemned or divested of his right until he has had the opportunity of being heard; and if judgment is rendered against him before that is done, the proceeding will be as utterly void as though the court had undertaken to act where the subject matter was not within its cognizance;" by Mr. Justice Story, when he declared in his admirable work, Conflict of Laws, that "the common justice of all nations requires that no condemnation should be pronounced before the party had an opportunity to be heard;" by Chief Justice Marshall, when, in *The Mary*, 9 Cranch U. S. R. 126–144, he announced the same principle, as "a maxim of natural justice and universal application;" and by Mr. Justice Swayne, when he said, in the very case we are now considering, that to deny the respondent a hearing would be "a blot upon our jurisprudence and civilization, and would be contrary to the first principles of the social compact and of the right administration of justice."

And yet this plaintiff in error, holding a high judicial station under the government of the United States, in violation of these great principles, known everywhere as maxims of natural justice, not only denied the respondent a hearing in his court, but, on the very day on which he committed that judicial act, which the supreme court of the United States characterized in the strong language of Mr. Justice Swayne, as "a blot upon our jurisprudence and civilization," he entered the order of condemnation and sale upon twenty days' notice, and himself became the purchaser at a price so grossly inadequate as to shock the moral sense of every honest man. And now when the owner, who has been thus deprived of his estate under the forms of law by a judicial fraud, comes into a court of justice to assert his rights, in an action of ejectment against the man, who, acting as judge, denied him a hearing in his court, and entered a decree of condemnation and sale of his property, he is met by that very decree of condemnation and sale, entered by his adversary, in violation of every principle of law and natural justice; and the court is gravely asked to instruct the jury, that the decree of condemnation and sale, thus obtained, "has divested the plaintiff in ejectment of his legal title to the property in controversy, and that they must find for the defendant."

In other words, the court was asked to instruct the jury, that although the very record upon which the defendant, Underwood, relied as a muniment of his title conclusively showed, as it did show, that McVeigh had been denied a hearing in his court, by ordering that his "appearance, answer, and claim be stricken from the files" of his court; which judicial act was declared by the supreme court of the United States "to be contrary to the first principles of the social compact and the right administration of justice," yet that the title of McVeigh was divested by this judicial fraud, and that he could not assert his rights in an action of ejectment.

The court properly refused this instruction. The decree of condemnation and sale entered under such circumstances was not valid for any purpose. It was the merest nullity. In the language of Judge Bronson, in *Bloom* v. *Burdick*, above cited, "the proceedings were as utterly void as though the court had undertaken to act when the subject matter was not within its cognizance." The general principle is not at all affected by the allegation in the order denying a hearing, that McVeigh was "a rebel living in the rebel lines."

The supreme court of the United States, by its unanimous opinion (11 Wall. 267, above cited) has put that question forever at rest, when it says: "It is alleged that he (McVeigh) was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot on our civilization and jurisprudence. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

We are, therefore, of opinion, that the said corporation court of Alexandria did not err in refusing the said first instruction asked for by the plaintiff in error.

We are now to consider the second assignment of error, which is, that the court refused to give the second instruction asked for by the plaintiff in error; which instruction is in these words: "That the said judgment and order in the said attachment suit, and the said sale and conveyance of the premises in the declaration mentioned, made by the sheriff, divested the plaintiff of the legal title to said premises; and that the jury must, therefore, find the issue joined for the defendants."

The court refused to give this instruction, but gave the following: "That the judgments and orders in the said attachment suits, and the sale and conveyance of the premises in the declaration mentioned, made under authority thereof, by the sheriff, divested the plaintiff of his legal title to said premises; and that the jury must, therefore, find for the defendants, unless they find that the said sale was fradulently made, and the confirmation thereof was procured by fraud; and that the defendants or either of them were privy to such frauds, or had notice of the same, or of such circumstances as would put a prudent *bonâ fide* purchaser upon the inquiry in respect thereto."

"If the jury believe from the evidence that the defendants, or either of them, combined with John B. Alley and others to purchase the property claimed in this suit, at the attachment sale, at a sacrifice; and if

they shall further believe that the said defendants, or either of them, in pursuance of such combination, so acted as to prevent competition at said sale, or to prevent the said property from realizing a fair value, then such combination and action was fraudulent; and the jury must find for the plaintiff."

The granting of these two last instructions, and the refusal to grant the second instruction of defendant, in lieu of which these last were given, constitute the second, third, and fourth assignments of error, which will be considered together, as they raise the same legal questions, involving the consideration of principles common to all.

It is undeniably true, as contended by the able counsel for the plaintiff in error, as a general proposition, that a sheriff's deed conveying property which has been duly levied upon and fairly sold under a valid judgment rendered by a court of competent jurisdiction, passes the legal title to the purchaser. But it is equally true, that if the sale made by the sheriff was fraudulently made, and the order of confirmation of said sale was procured by fraud, and the purchaser was a party to that fraud, the deed of the sheriff shall avail nothing for or against the parties affected by it.

These two propositions are undeniably true; they are independent of each other, and stand well together.

The proposition, that a sheriff's deed for property sold under a valid judgment of a court of competent jurisdiction passes the legal title, is, as a matter of course, subject to the qualification that all the proceedings are regular and *bonâ fide*, and free from the taint of fraud. If fraud be shown, either in the proceedings or sale, or in the judgment confirming the sale, the whole proceedings are vitiated. The proceedings of a court of justice establishing rights, or fixing liabilities, must always be founded upon the fact that they are carried out *bonâ fide*, and without the taint of fraud. If fraud be shown the very fountain is poisoned, and all the proceedings are null and void. Courts of law and courts of equity have concurrent jurisdiction to suppress and relieve against fraud. If a case of fraud be established, the courts will set aside all transactions founded upon it, by whatever machinery they have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. It is immaterial whether such machinery and contrivance consisted in a decree in equity and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud. Kerr on Fraud & Mistake, 44; 1 Johns. Ch. 401; 5 How. R. (Miss.) 365; 1 New Hamp. R. 535; 1 P. Wms. R. 786; 12 Ves. R. 324; 7 Com. Bench N. S. 321; 32 Law Jour. Exch. 241.

A judgment or decree obtained by fraud upon a court does not bind such court or any other; and its nullity on this ground, though it has not been reversed or set aside, may be alleged in a collateral proceeding. Kerr on Fraud & Mistake, 298; 11 How. 437; 5 Cal. R. 406; 63 Penn. R. 408; 62 Penn. R. 481, and other cases cited by Mr. Kerr. In *Rex v. Duchess of Kingston*, 20 How. St. T. 355, 544 (2 Smith's L. C. 687), De Grey, C J., said: "Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical and temporal. In applying this rule, it matters not whether the judgment impugned has been pronounced by

an inferior court, or by the highest court of judicature; but in all cases alike it is competent for every court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud." Kerr on Fraud & Mistake, 294.

In the language of Lord Brougham, in *Earl of Bandon* v. *Becher*, before referred to: "It is not an irregularity, it is not an error, which is here complained of, but it is that the whole proceeding (after the judgment) is collusive and fraudulent; that it cannot therefore be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up."

We are, therefore, of opinion that there was no error in the court below in refusing the instruction in the form in which it was presented, and in saying to the jury that the defendant in error, McVeigh, was divested of the legal title in the premises by the sale and deed of the sheriff; *unless* they should find "that the said sale was fraudulently made, and the confirmation thereof was procured by fraud, and that the defendants, or either of them, were privy to such fraud," &c.

The case of *Lessee of Cooper* v. *Galbraith*, 3 Wash. C. C. R. 546, is one exactly in point on this question. It was an action of ejectment (as is the case before us), and on the merits of the case it was contended that the lessee of the plaintiff was the presiding judge of the court in which the judgment was rendered; and it appeared in evidence that he purchased an interest in that judgment, and was concerned with the nominal purchase of the land in controversy, under the execution; that this conduct amounted to a breach of official duty; and, in short, that the whole transaction was tainted by such marks of fraud, imposition, and misconduct as ought to invalidate the purchase.

The whole question of judicial misconduct and fraud, in acquiring title to the property on which the action was founded, was submitted by Mr. Justice Washington to the jury.

So, also, in the case of *Martin* v. *Raulett*, 5 Rich. Law R. 541, which was an action of trespass to try the title to real estate, in which one party claimed under a sheriff's deed, the jury was instructed, among other things, "that all sales at auction should be open to full and free competition," and that "the purchaser must do no act the effect of which was to destroy fair competition." Judge Withers, delivering the opinion of the court, said: "The jury, applying the standard presented to them, have affirmed that Gary's conduct did contravene such rule of law and vitiate the sale by the sheriff to himself. In this they have differed from the presiding judge. . . . . Without undertaking to form any opinion ourselves, in the present case, we must allow that when such a question does arise in a cause, there is no other arbitrament to which it can be submitted but that of the jury." So we say in the case before us, that the question whether "the sale was fraudulently made, and the confirmation thereof was procured by fraud," was properly submitted by the court to the arbitrament of the jury, who in an action at law are the sole judges of the facts which constitute fraud. They have decided that question in the affirmative, and we cannot trench so far upon the province of the legal triers of fact as to reverse their decision, especially in a case where no motion is made for a new trial upon the ground that the verdict is contrary to the evidence.

The principles herein announced are not at all in contravention of the decisions of this court in *Taylor* v. *King* and *Harris* v. *Harris*, 6 Munf. 358, 367, so much relied on by the learned counsel for the plaintiff in error. Those cases simply affirm, "that a party or privy to a deed cannot avoid it, in a court of law, by parol evidence, on the ground of want of consideration, for he is estopped from averring such matter against a specialty." *Taylor* v. *King* was a case in which both parties claimed under the *same grantor*, Charles Lewis, who conveyed the property in controversy to Edmundson, trustee, to secure certain creditors who assigned their debt to Taylor. After the execution of the trust deed to Edmundson, and *of course subject to that deed*, Lewis sold the land to King, and put him in possession. There was a sale under the trust deed, and Taylor became the purchaser, and the deed was made from the trustee to Taylor. This of course invested Taylor with the legal title. In an action of ejectment brought by *Taylor* v. *King*, who was in possession, this court held that King, who purchased the land of Lewis after he had conveyed to Edmundson, trustee, held it subject to the deed to Edmundson; and that claiming under the same grantor, he, King, was estopped from showing in a court of law, by parol, anything to impeach the deed of the grantor under whom he, as well as Taylor, claimed title.

Now, it is insisted that in the case before us the legal title to the land in controversy, which was in McVeigh, passed by the sheriff's deed, under the sale in the attachment proceedings, just as the legal title in the case of *Taylor* v. *King* was passed by the deed of the trustee, and that McVeigh cannot, in a court of law, impeach that deed. It is true, as before observed, that a sheriff's deed for property sold under a valid judgment, passes the legal title; but this proposition must always be subject to the qualification, that the proceedings are free from the taint of fraud. If the sale be fraudulent, or the judgment be obtained by fraud, then the deed of the sheriff conveys nothing, and is a mere nullity.

The distinction is plain between this case and that of a deed of trust. In the one case the grantor voluntarily parts with the legal title, when he conveys to a trustee. It is gone from him forever, and no party or privy to that deed can assail it; but is estopped in law from impeaching the legal title thus vested in the trustee. But when the legal title is transferred by judicial proceedings, those proceedings must be regular, and free from fraud. If fraudulent they have no operation, and a deed under them, fraudulently made, or for property made at a fraudulent sale, conveys nothing, and will be treated in every court where this can be shown as a nullity.

This is the plain result of all the authorities referred to.

We are therefore of opinion that there was no error in the instruction of the court below, which charged the jury that the sheriff's deed under the attachment proceedings "divested McVeigh of the legal title, and that they must therefore find for the defendant; *unless* they should find that the said sale was fraudulently made, and the confirmation thereof was procured by fraud," &c.

Nor did the court err in instructing the jury that "if the defendants combined with others to purchase the property at a sacrifice, and in pursuance of such combination so acted as to prevent competition at said

sale, and to prevent the said property from realizing its fair value, then such combination was fraudulent; and the jury must find for the plaintiff."

Whatever conflict of authority there may be as to how far a *bonâ fide* purchaser at a judicial sale will be protected against error in the proceedings, it is well settled, that when the purchaser combines with others to prevent competition, and thus gets the property at a sacrifice, he is *not a bonâ fide* purchaser, and he cannot hold the property obtained by his own fraud. Kerr on Fraud, 224, and cases there cited. In *Cocks* v. *Izard*, 7 Wall. U. S. R. 559, it is said: "The law does not tolerate any influence likely to prevent competition at judicial sales, and it accords to every debtor the chance for a fair sale and full price."

In *Slater* v. *Maxwell*, 6 Wall. U. S. R. 268, the supreme court of the United States says: "It is essential to the validity of judicial sales, not merely that they should be conducted in conformity to the requirement of law, but that they should be conducted with entire fairness. Perfect freedom from all influence likely to prevent competition in the sale should be strictly exacted."

It has been held in numerous cases, that a purchaser who used unfair means to prevent competition cannot hold the property. *Newman* v. *Meek*, 1 Freeman's Ch. R. 441; *Johnston* v. *La Motte*, 6 Rich. Eq. R. 347; *Plaster* v. *Burger*, 5 Ind. R. 232. See also *Martin* v. *Raulett*, 5 Rich. Law R. 541, and *Dutcher* v. *Leake*, 44 Illinois R. 398. In the last named case it was held, "that when a purchaser at a judicial sale combines and confederates with the officer and others to conduct the sale as secretly as possible to prevent competition, and represents to the party interested in such sale that it had been postponed, with intention to deceive such party, to the end that he shall not be present to compete for the purchase of such property at such sale, such party is not a *bonâ fide* purchaser, and will not be protected against errors in the proceedings.

And although mere inadequacy of consideration, standing by itself, is not a sufficient reason for setting aside a judicial sale; yet if it exists in connection with other circumstances tending to impeach the fairness of the transaction and the good faith of the purchaser, it is entitled to great weight in determining the *bonâ fide* character of the purchaser, and to his protection as such."

We are now to consider the last assignment of error, to wit: that the court erred in admitting the depositions offered by the defendant in error, McVeigh, the plaintiff in the court below. The bill of exceptions reserving this point states that "the plaintiff further to maintain the issue, and in order to prove that said attachment and confiscation sales and the confirmation thereof were procured by fraud, and that the defendant Underwood was a party to and had notice of said fraud, offered to read respectively the depositions of John C. Balderston, Francis Dane, and John P. Robinson; to the reading of each of which the defendants objected, but which the court, overruling the defendants' objections, allowed to be read; it having been stipulated between the parties, that no objection should be made to the reading of same on matters of form or notice, — all matters of substance, however, being open to objection, the same as if made at the time of taking said depositions and as if they had been taken in this case."

These depositions had been taken in a proceeding against Oakes Ames, John P. Alley, and Samuel Hooper, who had purchased McVeigh's property at the attachment sale (Alley having transferred his purchase of the house and lot to Mrs. Underwood), upon a rule awarded in the attachment suit of *Francis Dane & Co.*, and other plaintiffs, v. *C. A. Baldwin & Co.*, defendants, of whom McVeigh was one. After the action of ejectment was brought, in order, no doubt, to save the trouble and expense of retaking the same depositions, it was agreed to waive all objections as to matters of form and notice, and in effect regard the depositions as having been taken in the action of ejectment, upon due notice, but reserving the right to object to the reading of the depositions upon all matters of substance. And, accordingly, the only objection urged here against the reading of the depositions is, that the evidence is irrelevant and immaterial, it being insisted that the legal effect of the sentence of condemnation, and the sale and conveyance by the sheriff, in the attachment suit, was to divest McVeigh of the legal title; and even though the sentence of condemnation was a fraud upon McVeigh in denying him a hearing, and the sale was fraudulent, the legal title was transferred to the purchaser, and McVeigh could not maintain his action in ejectment.

The motion to exclude the depositions, therefore, raises, and was intended to raise, precisely the same legal questions which have been already disposed of in noticing the 2d, 3d, and 4th assignments of error. It is not necessary, therefore, to repeat the views and citations of authorities already referred to, which show that when McVeigh was met in his action of ejectment by the production of the records in the confiscation and attachment suits, and the defendants relied upon the deeds of the marshal and the sheriff, it was competent for McVeigh to show by evidence, as well as by the face of the proceedings, that they were fraudulent and void, and that deeds made under them conferred no title.

For this purpose, the evidence which the plaintiff in error in his petition insists was immaterial and irrelevant, was most material and very relevant. It certainly strongly tended to show, and did, in the opinion of the jury, as their verdict proves, conclusively show, that there was formed between the plaintiff in error, John P. Alley, Oakes Ames, and others (the last two named being members of Congress from the State of Massachusetts), a corrupt and fraudulent combination to prevent competition, and to secure to themselves the whole real estate of McVeigh at the lowest possible price, and one grossly inadequate to its real value. We extract from these depositions (which are quite voluminous and give with much detail a complete history of these transactions) only enough to show the relevancy and materiality of the evidence offered. John C. Balderston, of Baltimore, testified as follows: "As a member of the firm of Balderston, Ward & Co., and as agent for Francis Dane & Co., Kimball, Robinson & Co., the last two being Boston firms; also, as agent for the Asiatic Bank of Salem, Mass., I had certain notes and claims against C. A. Baldwin & Co., of Alexandria, of which firm Mr. McVeigh was a partner. I went with these claims to Alexandria; learned that Mr. McVeigh was in Richmond, or somewhere in Virginia beyond our lines. This was at sometime in the spring or summer of 1863. I placed the matter in the hands of Mr. Beach, an attorney at law, who afterwards

instituted suit upon them against Baldwin & Co. He advised us, subsequently, that he had obtained judgments thereupon, and that attachments had been issued against the property of McVeigh, or a portion of it. Nothing further was done about them, until I learned that the property had been seized by the United States marshal, under the confiscation act, and was advertised to be sold thereunder. Upon hearing that fact, I started for Washington, and endeavored to obtain a postponement of the sale. I called upon Mr. Alley in relation to it, in the months of January and February, A. D. 1872. Mr. Alley promised any assistance he could give in furthering our object.

"I then went to Alexandria, saw Mr. Beach, who advised that the confiscation act could not apply in the case; that the decree of confiscation made by Judge Underwood was against the fee simple of the estate, and could not be sustained. After the lapse of a few months, having learned that I could not obtain a postponement of the sale, I communicated with the parties interested, upon which Mr. Dane and Mr. Robinson came to Washington, arriving there on the morning of April 9th, 1864. The next day we had an interview with Judge Underwood, in company with Mr. Beach. The judge refused to postpone the sale, but intimated that we might make an arrangement about our claims. He said he wanted to buy a dwelling house for his wife, and if he became the purchaser at the sale, he for one would be willing to pay fifty *per cent.* of his proportion of our judgments. He informed us that Mr. L. E. Chittenden, who was interested in a steamship company, would be likely to purchase the wharf property, but would not bid on the dwelling houses; and advised us to see Mr. Chittenden.

"In the afternoon of the same day, after the above named interview, we met Mr. Alley on Pennsylvania Avenue. Mr. Robinson informed him (Mr. Alley) that the sale was to take place the next day. Mr. Alley advised us to buy the property if it was not sold too high, with a view to secure our claims under the judgments and attachments. That evening Robinson and myself went to Mr. Chittenden's house; informed him that Judge Underwood had intimated that he (Mr. Chittenden) might perhaps buy the wharf property. Mr. Chittenden said he might buy it, provided that he could get it at a price which he would consider equivalent to a fair rent for a few years; that he had no confidence in the title to be derived under the confiscation sale; that it would be well for us to see Mr. Thomas Clyde, who would arrive in Washington in the morning, and was largely interested in the steamship corporation.

"It was suggested to Mr. Chittenden that there would be no time in the morning to see and talk with Mr. Clyde, as the sale was advertised to take place at 10 o'clock; upon which he said he would write Judge Underwood, asking him to postpone the sale until he could get there. He accordingly sat down and wrote a note, and gave it to Mr. Robinson, addressed to Judge Underwood.

"Next morning all the parties met at Alexandria court-house, Mr. Alley and Mr. Oakes Ames being on board the boat on which I met with Mr. Clyde. Mr. Chittenden arrived there after us. Messrs. Dane and Robinson and myself had an interview with Mr. Chittenden and Mr. Clyde in the court-house, the sale having been postponed. At this inter-

view Mr. Clyde refused to purchase under the sale, or to buy our judgments, or, as he expressed it, to have anything to do with it. The sale took place at 12 o'clock (noon). The property was in seventeen different lots. The attachments in our favor were issued only against seven or eight of them, and as these were separately offered for sale I gave notice to the by-standers of the attachments against them held by us.

"The sale occurred on Monday, the 11th day of April, 1864. The deputy marshal who conducted the sale denied the validity of our claims against the property as against proceedings under the confiscation act. A portion of the property covered by our attachments was purchased by a Mr. Eldridge. After the sale we all returned to Washington. I did not see Mr. Ames or Mr. Alley at the sale. I learned at Washington that Mr. Eldridge had purchased the property for Mr. Ames, and I was afterwards told by Mr. Alley that he was interested in the purchase with Mr. Ames. This was on the evening of the day of sale, in the lobby of the House of Representatives. The next morning, Robinson, Dane, and myself had an interview with Mr. Ames and Mr. Alley at the Washington House, in Washington. Mr. Alley proposed we should go in jointly with them in the purchase, we putting in our judgment claims in the joint concern; that he, Mr. Alley, could rent the property to the government, and thereby we should be able to realize our interest.

"We acceded to this proposition at the suggestion of Mr. Alley and Mr. Ames, they becoming security in accordance with the laws of Virginia. The property was advertised to be sold by the sheriff under our judgments. We all then returned home.

"Early in May I went again to Washington. I was there joined by Dane, Robinson, and L. B. Harrington, then President of the Asiatic Bank. We then sold our judgments to Mr. Alley for the full amounts, less seven hundred dollars — that being the estimated proportion of a prior attachment resting upon the property. On the morning of May 10th, 1864, the day on which this sale under our attachments was advertised to take place, in Mr. Beach's office in Alexandria, we executed the assignments of our judgments to John B. Alley, Oakes Ames, Samuel Hooper, and William A. Duncan. The sale was advertised (according to the best of my knowledge and belief) to take place at 12 o'clock, but did not in fact take place until about 2 o'clock, P. M., though I had heard of no announcement made of a postponement.

"After the necessary papers were all prepared we went from the office of Mr. Beach to the market-house, where the sale was to take place, and was made. Prior to the sale Mr. Alley insisted that we should not bid against him. I only recollect the following named persons being present at the sale, namely, Mr. Robinson, Mr. Harrington, and myself, Mr. Beach (our attorney), Mr. Alley, Mr. Duncan, Walter Penn (auctioneer at the previous sale), the sheriff, and two or three others, whom I did not know. The property was mostly bid in by Mr. Alley. I made some bids at his suggestion, and he would bid over me. I think Mr. Duncan made one or two bids. Mr. Alley managed the bidding.

"In the settlement of our sale to Mr. Alley and others we received Mr. Ames's note for four thousand dollars, at sixty days, Mr. Alley's draft on his house in Boston for the balance of the sum due, less Mr.

Duncan's payment to him of fifteen hundred and fifteen dollars, which he, Mr. Alley, paid over to us. I overheard Mr. Alley and Mr. Duncan agree to proportionately share the risk of a note to be given by Judge Underwood for his proportion of the purchase. In conversation with Mr. Alley, at which he insisted, as I have before expressed, that we should not bid against him, his language was, 'we having purchased your judgments, you are not to (or will not) bid against us.' This is as nearly as I can recollect it."

In answer to the eighth question by the counsel for C. A. Baldwin & Co., "At the attachment sales who bid in the said dwelling-house last mentioned, and at what price?" he said, "John B. Alley, at about thirteen hundred dollars; but I have since seen a certified copy of a deed from the sheriff of Alexandria county to Maria G. Underwood."

In answer to the sixteenth question by same: —

"You have stated, in answer to the third question above, that the said attachment sales were advertised to take place at 12 o'clock M., but in fact did not take place until 2 o'clock P. M., on the day of sale, and that you heard no announcement made of a postponement: why was the postponement made?" he said, "It was made to enable Mr. Beach to prepare the papers by which we assigned our judgment claims to John B. Alley, Oakes Ames, Duncan, &c.; and after the papers were prepared we went to the market-house, and the sales were made."

In answer to the seventeenth question by same: —

"Was any bell rung, or any public announcement made that the sale was then to take place, so as to give persons who might wish to make *bonâ fide bids* an opportunity to purchase the property?" He said, "There was no bell rung to attract a crowd. The auctioneer merely stated to those who accompanied him from Mr. Beach's office, that the sale would then take place. No effort was made to gather a crowd of bidders."

In answer to the eighteenth question by same: —

"Was there or not in fact anything more than a mere form of sale?" He answered, "*There was hardly even a form of sale.*"

In answer to the twentieth question by the same: —

"Were or not the persons interested in the attachment sales the same persons interested in the confiscation sales?" He replied, "*They were all the same ring.*"

In answer to the question, "What price did said house (meaning the house in controversy) bring at such attachment sale, and what was its real value?" He said, "It sold for seven hundred dollars, and I should think it was worth from *ten to twelve thousand dollars.*"

Francis Dane, of Boston, testified as follows: "Our firm had a claim in 1861 for some forty-five hundred dollars against the firm of C. A. Baldwin & Co. of Alexandria, in Virginia, of which firm Mr. McVeigh was a partner. In 1862 we sent the claim to Mr. Balderston, at Baltimore, who had a claim against Baldwin & Co., with a request that if he concluded to institute suit against them on his own claim, to also cause the same to be done with ours. Our claim was accordingly put in suit, and judgment was obtained in our favor in January 1864, at the court in Alexandria. In the spring of 1864 we were informed by Mr. Beach, our attorney, that Judge Underwood had confiscated, by a decree in his court,

and had caused to be advertised for sale under the confiscation act, the property which he had attached, and also other property in Alexandria belonging to Mr. McVeigh. The sale was to take place at public auction, on the 11th of April, 1864. Mr. Robinson, of the firm of Kimball, Robinson & Co. of Boston, proceeded to Washington with me, and we arrived there on the 9th, where we met Mr. Balderston, who was waiting for us. We proceeded to Alexandria (Mr. Robinson, Balderston, and I), and had an interview with Mr. Beach, our attorney. He wished us to go with him to Judge Underwood, to try and get the sale of the property postponed, on which our attachment lay. The judge being absent at Washington, Mr. Beach asked us to come down the next morning and meet him together, advising us if we could not get the sale postponed, not to buy in the property, unless we could get it for a sum equivalent to the rents of same while the war should last; that is to say, for a nominal sum, as he called it; that he could not have any question that the decision of the court upon the confiscation act could not be sustained. We had the interview with the judge, all of us together, on the following day — urged the judge to make the postponement, which he declined to do. The judge told us this was the first case in which property had been confiscated in fee simple, and that Mr. Whiting, solicitor of the War Department, had complimented him on that decision."

He further testified: "We, next day being the 10th of May, on which the property was advertised to be sold at 12 o'clock, proceeded to Alexandria; there met Mr. Alley and Mr. Ames, and transferred the judgments, with all the right, title, and interest on the claim on which the judgments were founded, to John B. Alley, Oakes Ames, Samuel Hooper, and William A. Duncan. Mr. Duncan informed me that a previous arrangement had been made between Mr. Alley and the parties who purchased at the confiscation sale, to pay their proportional share of the judgments in our favor, and by that means they would have a double title; so that if one should fail, they would be able to hold on to the other. In Mr. Ames's words, he wanted these judgments to plaster over the property. We attended the sale, which took place two hours later than the time advertised; there were some ten or twelve persons present, including Mr. Alley, Mr. Beach, Mr. Robinson, Mr. Balderston, the sheriff, his clerk, and myself. The property was sold, and bid off by Mr. Alley in different parcels, each house being sold separately. There were some bids made at his request, but as far as I heard the last bid on each piece of property was made by Mr. Alley, after he had requested others to bid. Previously to attending the sale, Mr. Alley insisted upon our not bidding on the property, as he had bought our claims. A copy of the assignment or transfer of the judgments above referred to is hereto annexed, marked A."

In answer to the sixth question by the counsel for C. A. Baldwin & Co., "Why then did you sell your judgments to Alley, Ames, and others after the confiscation sales?" He said, "Because we were assured by Judge Underwood and by Alley and Ames, then members of Congress from Massachusetts, the confiscation sales were valid and binding, and that our attachments were of no value; that the confiscation would be sustained by the court; and we thought, under the circumstances, that it

was necessary for us to save ourselves by accepting their offer to buy our judgments, which was a small amount in comparison to the value of the property. The parties above mentioned said that if they failed on the confiscation title they would fall back on the attachment title, and they were willing to pay us something for our judgment and liens; and that they paid us in full, except $700."

Mr. John P. Robinson, of Boston, testified as follows: "In 1861, and for sometime before and after, I was a member of the firm of Kimball, Robinson & Co., and in 1861 we had certain claims against C. A. Baldwin & Co. of Alexandria, of which Mr. McVeigh was a partner. These claims being unpaid at maturity, we placed them in the hands of S. Ferguson Beach, an attorney at law of Alexandria, for collection. Mr. John C. Balderston, of the firm of Balderston, Ward & Co. of Baltimore, having claims of their own against Baldwin & Co., acted for us in placing them in Mr. Beach's hands. Mr. Beach commenced a suit against Baldwin & Co., attaching certain real estate belonging to Mr. McVeigh, upon which suit he obtained a judgment at the January term in 1864, for over $3,000. As we could not sell that property without first giving bonds of some party who held real estate in the State of Virginia, we did not take any measures to sell or effect a sale, or give any special attention to it, until we were informed that the United States government had seized the property under the confiscation act, and had advertised it for sale. We then took measures, by correspondence and otherwise, to obtain a postponement of the sale by the government, believing that as we were loyal creditors we should be entitled to the avails of the property on our judgment rather than the government. Our claims were contracted before the war. Being unable to effect a postponement, and learning that the property would be sold under the confiscation act on the 11th day of April, 1864, I went to Washington in company with Mr. Francis Dane, of Boston, arriving there on the 9th of April, and met Mr. Balderston in Washington. We, Dane, Balderston, and myself proceeded to Alexandria, had an interview with Judge Underwood, of the United States district court, by whose decree the property was confiscated. We urged him to postpone the sale; which he declined to do. He said, however, if the property should be sold under the decree of confiscation, he would like to buy, or have his wife to buy, he having no money of his own to purchase with, as he said, one of the houses which our attachment covered, for his own use. He said he thought the parties buying under the confiscation act would pay us something for our judgments, to obtain a more perfect title, and make it sure if the confiscation act should be set aside. He knew the amount of our judgments, and said that in his own case, and also others who might purchase, he would advise to pay us fifty *per cent.* of the amount of our claims, adding, "perhaps we might get more than that out of the parties who might purchase, if the property did not sell very high." He further testified: "When we were in Alexandria we took measures to have the property advertised for sale under our judgments, which sale was advertised to take place on the 10th of May 1864. Before that time arrived we were informed that Mr. Alley and Mr. Ames declined to carry out the memorandum agreement referred to above. After receiving that information, Mr. Dane, Mr. L. B. Harrington, president of the Asiatic

Bank, at Salem, and myself, went to Washington to be present at the sale. We arrived there a few days before the 10th of May, 1864, and found that Mr. Ames and Mr. Alley abandoned the agreement, stating that the memorandum they had given us would not stand in law; and although Mr. Alley wrote it, Mr. Ames said Mr. Alley found fault with him for having signed it. The day before the sale was to take place Mr. Dane, Harrington, Balderston, and myself made a bargain with Mr. Alley, by which Mr. Alley was to purchase for himself and others all our judgments at seven hundred dollars less than their whole amount. We were told that the parties who bought the property under the confiscation sale were ratably interested in the judgments with Mr. Alley. On the morning of the sale we went to Alexandria, and the papers were made, assigning our interest to John B. Alley, Oakes Ames, Samuel Hooper, and W. A. Duncan, according to the agreement made the previous day with Mr. Alley; thereupon Mr. Alley and Mr. Ames executed the bonds which the law required to be given, and we received in notes, checks, and money the amount agreed upon with Mr. Alley. Some two hours or more were occupied in executing the papers, beyond the time when the sale was to take place. Mr. Ames returned to Washington before the sale. I went down to the place of sale with Mr. Dane, Balderston, Harrington, Mr. Alley, and Mr. Beach, and some half a dozen others.

"The property was sold by the sheriff under the direction of Mr. Alley chiefly, and I think he was the principal purchaser. Mr. Alley told us as he was to purchase our judgments we must not bid against him. There was apparently *no competition among those present* for the purchase of the property. As we were going from Mr. Beach's office to the place of sale, Mr. Alley told me they might wish to have some piece of the property struck off to me. When one of the parcels was struck off, in reply to the inquiry of the auctioneer, 'Who was the purchaser,' Mr. Alley gave my name. I assented to it, but made no bid, and had nothing further to do with it."

We have made these extracts from the depositions to show that the evidence was relevant and material to the issue, and that the court below did not err in refusing to exclude them from the jury. No evidence whatever was offered to contradict or explain this testimony; and upon this unimpeached and unimpeachable testimony the jury found their verdict. There was no motion to set aside the verdict as contrary to the evidence; and if there had been, this court, upon the record before us, would have been compelled to have sustained the verdict. The whole question of fraud was properly submitted to the jury. Their verdict is conclusive in the case, especially as no effort is made by the plaintiff in error to contradict or explain the overwhelming and unimpeached evidence; and the court was not even asked to set aside the verdict of the jury as contrary to the evidence.

Upon the whole, we are of opinion that the judgment of the corporation court of the city of Alexandria should be affirmed.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1873.]

MUNICIPAL CORPORATION. — JURISDICTION OF U. S. COURTS IN RESPECT OF TAXATION. — MANDAMUS.

REES v. *CITY OF WATERTOWN.*

The fact that the officers of a municipal corporation wilfully evade the execution of a judgment against it will not authorize the levy of a tax by a court of the United States to pay such judgment.

In a proper case a court of the United States has jurisdiction to issue the writ of mandamus to compel the officers of a municipal corporation to levy a tax, but it cannot under any circumstances direct its own officer to enforce the writ by levying upon the property of individuals, unless expressly authorized to do so by state enactment.

THE facts appear in the opinion.

Mr. Justice HUNT delivered the opinion of the court.

The plaintiff was the owner of certain bonds issued by the city of Watertown to the Watertown and Madison Railroad Company, and by them sold for their benefit. The plaintiff recovered three several judgments in the United States court on these bonds, amounting to nearly $10,000 each. Afterwards he brought another suit in the United States court for the Western District of Wisconsin, upon these several judgments, and on the 8d of February, 1871, recovered a judgment for $11,066.89.

In the summer of 1868 he issued executions upon the two judgments first obtained, which were returned wholly unsatisfied.

In November of the same year he procured from the United States circuit court a peremptory writ of mandamus, directing the city of Watertown to levy and collect a tax upon the taxable property of the city, to pay the said judgments; but, as the plaintiff alleges, before the writ could be served, a majority of the members of the city council resigned their offices. This fact was returned by the marshal, and proceedings upon the mandamus thereupon ceased.

In May, 1869, another board of aldermen having been elected, the plaintiff procured another writ of mandamus to be issued, which writ was served on all of the aldermen except one Holger, who was sick at the time of the service upon the others. No steps were taken to comply with the requisition of the writ. An order to show cause why the aldermen should not be punished for contempt, in not complying with its requirements, was obtained, and before its return day six of the aldermen resigned their offices, leaving in office but one more than a quorum, of whom the said Holger, upon whom the writ had not been served, was one. Various proceedings were had and various excuses made, the whole resulting in an order that the aldermen should at once levy and collect the tax; but before the order could be served on Holger, he resigned his office, and again the board was left without a quorum. Nothing was accomplished by their efforts in aid of the plaintiff, but fines were imposed upon the

recusant aldermen, which were ordered to be applied in discharge of the costs of the proceedings.

In October, 1870, the plaintiff obtained a third writ of mandamus, which resulted as the former ones had done, and by the same means on the part of the officers of the city. A special election was ordered to be held to fill the vacancies of the aldermen so resigning, but no votes were cast, except three in one ward, and the person for whom they were cast refused to qualify. There is a very limited denial in the answer of some of these allegations, but their general truth is not denied. It is certain that no part of the debt of the plaintiff has ever been paid, and that with an accumulation of fourteen years' interest, the same remains wholly due, and that the plaintiff's efforts to obtain satisfaction of his judgments have failed.

The bill sets forth certain acts of the Legislature of Wisconsin, which, it is alleged, were intended to aid the defendant in evading the payment of its debts, and which, it can scarcely be denied, have had that effect, whatever might have been the intent of the legislature passing them.

The plaintiff asks the aid of the court to subject the taxable property of the city to the payment of his judgments, alleging that the corporate authorities are trustees for the benefit of the creditors of the city, and the property of the citizens a trust fund for that purpose, and that it is the duty of the court to lay hold of the property and cause it to be justly applied. He asks specifically that a decree may be made subjecting the taxable property of the citizens to the payment of his judgments, and that the marshal of the district may be empowered to seize and sell so much of it as may be necessary, and to pay over to him the proceeds of such sale.

This case is free from the objections usually made to a recovery upon municipal bonds. It is beyond doubt that the bonds were issued by the authority of an act of the Legislature of the State of Wisconsin, and in the manner prescribed by the statute. It is not denied that the railroad, in aid of the construction of which they were issued, has been built, and was put in operation.

Upon a class of the defences interposed in the answer and in the argument it is not necessary to spend much time. Thus it is alleged that the city of Watertown contains a population of but 7,553 inhabitants; that the value of its property is assessed at but little over a million of dollars; that the debt of the city is $750,000; that it is impossible for the city to pay this debt; that it was expected and provided that the railroad company would pay the bonds in question, but the roads have been foreclosed and sold; that the city has compromised and settled a portion of its indebtedness; that it has levied the taxes necessary to effect such compromise, and that it is ready to compromise all outstanding bonds and judgments at as high a rate as can be collected of the people of Watertown; that there is no law to compel the retention of office by aldermen to levy taxes; that the plaintiff took his chance of its being voluntarily done, and that, not being voluntarily done, there is no violation of law.

These theories are vicious. They are based upon the idea that a refusal to pay an honest debt is justifiable because it would distress the debtor to pay it. A voluntary refusal to pay an honest debt is a high offence in a

commercial community, and is just cause of war between nations. So far as the defence rests upon these principles we find no difficulty in overruling it.

There is, however, a grave question of the power of the court to grant the relief asked for.

We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the federal judiciary to assume the place of a state in the exercise of this authority, at once so delicate and so important. The question is not entirely new in this court.

In the case of *Supervisors* v. *Rogers*, 7 Wall. 175, an order was made by this court appointing the marshal a commissioner, with power to levy a tax upon the taxable property of the county, to pay the principal and interest of certain bonds issued by the county, the payment of which had been refused. That case was like the present, except that it occurred in the State of Iowa, and the proceeding was taken by the express authority of a statute of that State. The court say: "The next question is as to the appointment of the marshal as a commissioner to levy the tax in satisfaction of the judgment. This depends upon a provision of the Code of the State of Iowa. The provision is found in a chapter regulating proceedings in the writ of mandamus, and the power is given to the court to appoint a person to discharge the duty enjoined by the peremptory writ which the defendant had refused to perform, and for which refusal he was liable to an attachment . . . . and is express and unqualified. The duty of levying the tax upon the taxable property of the county to pay the principal and interest of these bonds was specially enjoined upon the board of supervisors by the act of the legislature that authorized their issue, and the appointment of the marshal as a commissioner, in pursuance of the above section, is to provide for the performance of this duty where the board has disobeyed or evaded the law of the state and the peremptory mandate of the court."

The State of Wisconsin, of which the city of Watertown is a municipal corporation, has passed no such act. The case of *Supervisors* v. *Rogers* is, therefore, of no authority in the case before us. The appropriate remedy of the plaintiff was and is a writ of mandamus. See *Riggs* v. *Johnson County*, 6 Wall. 166. This may be repeated as often as the occasion requires. It is a judicial writ, a part of a recognized course of legal proceedings. In the present case it has been thus far unavailing, and the prospect of its future success is, perhaps, not flattering. However this may be, we are aware of no authority in this court to appoint its own officer to execute the duty thus neglected by the city in a case like the present.

In *Welch* v. *Ste. Genevieve*, 1 Dill. C. C. 130, at a circuit court for the District of Missouri, a tax was ordered to be levied by the marshal under similar circumstances. We are not able to recognize the authority of the case. No counsel appeared for the city; Mr. Reynales as *amicus curiæ*

only; no authorities are cited which sustain the position taken by the court; the power of the court to make the order is disposed of in a single paragraph, and the execution of the order suspended for three months to give the corporation an opportunity to select officers and itself to levy and collect the tax, with the reservation of a longer suspension if it should appear advisable. The judge, in delivering the opinion of the court, states that the case is without precedent, and cites in support of its decision no other cases than that of *Riggs* v. *Johnson County*, 6 Wall. 166, and *Lansing* v. *County Treasurer*, 1 Dill. C. C. 522. The case cited from 6 Wallace does not touch the present point. The question in that case was whether a mandamus having been issued by a United States court in the regular course of proceedings, its operation could be stayed by an injunction from the state court, and it was held that it could not be. It is probable that the case of *Supervisors* v. *Rogers*, 7 Wall. 175, was the one intended to be cited. This case has already been considered.

The case of *Lansing* v. *County Treasurer*, also cited, arose within the State of Iowa. It fell within the case of *Supervisors* v. *Rogers*, and was rightly decided, because authorized by the express statute of the State of Iowa. It offered no precedent for the decision of a case arising in a state where such a statute does not exist.

These are the only authorities upon the power of this court to direct the levy of a tax under the circumstances existing in this case to which our attention has been called.

The plaintiff insists that the court may accomplish the same result under a different name; that it has jurisdiction of the persons and of the property, and may subject the property of the citizens to the payment of the plaintiff's debt without the intervention of state taxing officers, and without regard to tax laws. His theory is that the court should make a decree subjecting the individual property of the citizens of Watertown to the payment of the plaintiff's judgment; direct the marshal to make a list thereof from the assessment rolls, or from such other sources of information as he may obtain; report the same to the court, where any objections should be heard; that the amount of the debt should be apportioned upon the several pieces of property owned by individual citizens; that the marshal should be directed to collect such apportioned amount from such persons, or in default thereof to sell the property.

As a part of this theory the plaintiff argues that the court has authority to direct the amount of the judgment to be wholly made from the property belonging to any inhabitant of the city, leaving the citizens to settle the equities between themselves.

This theory has many difficulties to encounter. In seeking to obtain for the plaintiff his just rights, we must be careful not to invade the rights of others. If an inhabitant of the city of Watertown should own a block of buildings of the value of $20,000, upon no principle of law could the whole of the plaintiff's debt be collected from that property. Upon the assumption that individual property is liable for the payment of the corporate debts of the municipality, it is only so liable for its porportionate amount. The inhabitants are not joint and several debtors with the corporation, nor does their property stand in that relation to the corporation or to the creditor. This is not the theory of the law even in regard to

taxation. The block of buildings we have supposed is liable to taxation only upon its value in proportion to the value of the entire property, to be ascertained by assessment, and when the proportion is ascertained or paid it is no longer or further liable. It is discharged. The residue of the tax is to be obtained from other sources. There may be repeated taxes and assessments to make up delinquencies, but the principle and general rule of law are as we have stated.

In relation to the corporation before us, this objection to the liability of individual property for the payment of a corporate debt is presented in a specific form. It is of a statutory character.

The remedies for the collection of a debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to the creditor. Thus a statute prohibiting the exercise of its taxing power by the city to raise money for the payment of these bonds would be void. *Von Hoffman* v. *City of Quincy*, 4 Wall. 535. But it is otherwise of statutes which are in existence at the time the debt is contracted. Of these the creditor must take notice, and if all the remedies are preserved to him which were in existence when his debt was contracted, he has no cause of complaint. Cooley's Const. Lim. 285, 287.

By section 9 of the defendant's charter, Priv. Laws, ch. 237, p. 667, it is enacted as follows: "Nor shall any real or personal property of any inhabitant of said city, or any individual or corporation, be levied upon or sold by virtue of any execution issued to satisfy or collect any debt, obligation, or contract of said city."

If the power of taxation is conceded not to be applicable, and the power of the court is invoked to collect the money as upon an execution to satisfy a contract or obligation of the city, this section is directly applicable and forbids the proceeding. The process or order asked for is in the nature of an execution; the property proposed to be sold is that of an inhabitant of the city; the purpose to which it is to be applied is the satisfaction of a debt of the city. The proposed remedy is in direct violation of a statute in existence when the debt was incurred and made known to the creditor with the same solemnity as the statute which gave power to contract the debt. All laws in existence when the contract is made are necessarily referred to in it, and form a part of the measure of the obligation of the one party and of the right acquired by the other. Cooley's Const. Lim. 285.

But independently of this statute, upon the general principles of law and of equity jurisprudence, we are of opinion that we cannot grant the relief asked for. The plaintiff invokes the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the court of chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally its jurisdiction is as well defined and limited as that of a court of law. It cannot exercise jurisdiction when there is an adequate and complete remedy at law. It cannot assume control over that large class of obligations called imperfect

obligations, resting upon conscience and moral duty only, unconnected with legal obligations. Judge Story says, "There are cases of fraud, of accident, and of trust which neither courts of law nor of equity presume to relieve or to mitigate," of which he cites many instances. 1 Story, Eq. Jur. § 61. Lord Talbot says, "There are cases, indeed, in which a court of equity gives remedy where the law gives none, but where a particular remedy is given by law, and that remedy is bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it and extend it further than the law allows." *Heard* v. *Stanford*, Cas. temp. Talb. 174, cited by Story, *supra*.

Generally its jurisdiction depends upon legal obligations, and its decrees can only enforce remedies to the extent and in the mode by law established. With the subjects of fraud, trust, or accident, when properly before it, it can deal more completely than can a court of law. These subjects, however, may arise in courts of law and there be well disposed of. 1 Story Eq. Jur. § 60.

A court of equity cannot, by avowing that there is a right, but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels. Thus, assume that the plaintiff is entitled to the payment of his judgment, and that the defendant neglects its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens. This summary proceeding would involve a violation of the rights of the latter. He has never been heard in court. He has had no opportunity to establish a defence to the debt itself, or if the judgment is valid, to show that his property is not liable to its payment. It is well settled that legislative exemptions from taxation are valid, that such exemptions may be perpetual in their duration, and that they are in some cases beyond legislative interference. The proceeding supposed would violate that fundamental principle contained in chapter twenty-nine of Magna Charta, and embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law; that is, he must be served with notice of the proceeding, and have a day in court to make his defence. *Westervelt* v. *Greig*, 12 N. Y. 209.

"Due process of law," it is said, "undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." Ib. In the New England States it is held that a judgment obtained against a town may be levied upon and made out of the property of any inhabitant of the town. The suit in those States is brought in form against the inhabitants of the town, naming it; the individual inhabitants, it is said, may, and do, appear and defend the suit, and hence it is held that the individual inhabitants have their day in court, are each bound by the judgment, and that it may be collected from the property of any one of them. See the cases collected in Cooley's Const. Lim. 240 to 245. This is local law peculiar to New England. It is not the law of this country generally, or of England. *Russell* v. *Men of Devon*, 2 T. R. 661. It has never been held to

be the law in New York, in New Jersey, in Pennsylvania, nor, as stated by Mr. Cooley, in any of the Western States. See *Emeric* v. *Gilman*, 10 Cal. 408, where all the cases are collected. So far as it rests upon the rule that these municipalities have no common fund, and that no other mode exists by which demands against them can be enforced, he says that it cannot be considered as applicable to those states where provision is made for compulsory taxation to satisfy judgments against a town or city. Cooley's Const. Lim. 246.

The general principle of law to which we have adverted is not disturbed by these references. It is applicable to the case before us. Whether, in fact, the individual has a defence to the debt, or by way of exemption, or is without defence, is not important. To assume that he has none, and, therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest.

Again, in the case of *Emeric* v. *Gilman*, before cited, it is said: "The inhabitants of a county are constantly changing; those who contributed to the debt may be non-residents upon the recovery of the judgment or the levy of the execution. Those who oppose the creation of the liability may be subjected to its payment, while those, by whose fault the burden has been imposed, may be entirely relieved of responsibility. . . . . To enforce this right against the inhabitant of a county would lead to such a multiplicity of suits as to render the right valueless." We do not perceive, if the doctrine contended for is correct, why the money might not be entirely made from property owned by the creditor himself, if he should happen to own property within the limits of the corporation, of sufficient value for that purpose.

The difficulty and the embarrassment arising from an apportionment or contribution among those bound to make the payment we do not regard as a serious objection. Contribution and apportionment are recognized heads of equity jurisdiction, and if it be assumed that process could issue directly against the citizens to collect the debt of the city, a court of equity could make the apportionment more conveniently than could a court of law. 1 Story Eq. Jur. § 470 *et seq.*

We apprehend, also, that there is some confusion in the plaintiff 's proposition, upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit a question, that there is no chancery jurisdiction where there is an adequate remedy at law. The writ of mandamus is, no doubt, the regular remedy in a case like the present, and ordinarily it is adequate and its results are satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that, by means of the aid afforded by the legislature and by the devices and contrivances set forth in the bill, the writs have been fruitless; that, in fact, they afford him no remedy. The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. To illustrate: the writ of *habere facias possessionem* is the established remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate, and complete remedy. Not many years since there existed in Central New York combinations of set-

tlers and tenants, disguised as Indians, and calling themselves such, who resisted the execution of this process in their counties, and so effectually that for some years no landlord could gain possession of his land. There was a perfect remedy at law, but through fraud, violence, or crime, its execution was prevented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedies was temporarily suspended by means of illegal violence, but the remedies remained as before. It was the case of a miniature revolution. The courts of law lost no power, the court of chancery gained none. The present case stands upon the same principle. The legal remedy is adequate and complete, and time and the law must perfect its execution.

Entertaining the opinion that the plaintiff has been unreasonably obstructed in the pursuit of his legal remedies, we should be quite willing to give him the aid requested if the law permitted it. We cannot, however, find authority for so doing, and we acquiesce in the conclusion of the court below that the bill must be dismissed. *Judgment affirmed.*

Mr. Justice CLIFFORD. I dissent from the opinion of the court in this case upon the ground that equity will never suffer a trust to be defeated by the refusal of the trustee to administer the fund, or on account of the misconduct of the trustee; and also because the effect of the decree in the court below, if affirmed by this court, will be to give judicial sanction to a fraudulent repudiation of an honest debt. For which reasons, as it seems to me, the decree of the subordinate court should be reversed.

Mr. Justice SWAYNE concurred in the dissent.

SUPREME COURT OF IOWA.

[APRIL TERM, 1874.]

DEED OF MARRIED WOMAN. — REQUISITES OF. — EQUITY CANNOT CORRECT OMISSION OR MISTAKE IN BODY OF SUCH DEED.

HEATON v. *FRYBERGER.*

The deed of a married woman, to be operative as a valid conveyance, must be executed in strict conformity with all the statutory requirements.

Where the name of a married woman is omitted in the body of a deed, equity cannot supply the omission, even if the execution and acknowledgment are legally sufficient.

THE facts appear in the opinions.

DAY, J. The defendant testified that Rebecca Heaton was his sister; that he purchased the land in controversy in 1844 or in 1845, and paid therefor $100; that his father gave said land to Rebecca prior to his purchase thereof, and that the understanding was that he was to make them a deed; that the understanding was that he was to have the whole land, and a good title and warranty deed; and he always supposed he had such

a deed until September, 1869; and that he knew of no reason why it was not such, unless it was made by mistake in the form in which it was executed; that he went into possession in 1845, and has paid the taxes ever since; that he had ten acres broken on said tract in 1845 or 1846, and had twenty-five acres more broken and fenced in 1855 or 1856; and that he has had crops off the land regularly every year since 1856. That plaintiff's parents had full knowledge of his occupancy thereof, and his claim thereto, and they never asserted any claim to the ownership thereof.

The conveyance under which defendant claims is in the usual form of a warranty deed, and begins as follows: "This indenture, made this 17th day of April, in the year 1845, between Silas H. Heaton, of the county of Muscatine and Iowa Territory, of the first part, and Moses Fryberger, of the county of Muscatine, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one hundred dollars," &c. This deed is signed by Silas and Rebecca Heaton. The acknowledgment is in the following form: —

"TERRITORY OF IOWA, } ss.
Muscatine County. }

"I, David Odell, justice of the peace within and for said county, do hereby certify that this day appeared before me Silas Heaton and Rebecca Heaton, to me known to be the persons whose names are subscribed to the foregoing instrument, as parties thereto, and acknowledged the execution thereof to be their act and deed. And the said Rebecca Heaton, wife of Silas Heaton, on examination separate and apart from her said husband, acknowledged that she executed the same, and relinquished her dower in the real estate mentioned, freely and without compulsion, or undue influence of her said husband.

"Given under my hand," &c.

It is not shown that at the time of making this conveyance the grantors had taken possession of the premises, or made any improvements thereon. So far as appears from the evidence a mere verbal gift of the lands had been made to Rebecca Heaton by her father, Peter Fryberger. Rebecca therefore had no title to, nor interest in the lands which she could have enforced against her father, if he had refused to execute a conveyance to her. Hence, if the deed to defendant can have any operation as against Rebecca, it must be by way of estoppel, under the provisions of section 3, chapter 54 of the Revised Statutes of 1843, then in force, providing that "if any person shall convey any real estate by a conveyance purporting to convey the same, in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterward acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee; and such conveyance shall be as valid as if such legal estate had been in the grantor at the time of the conveyance." But, in order that a conveyance may so operate to pass an after acquired title, it must, we apprehend, be so executed that it would have passed the grantor's estate at the time of execution, if he had then held the title.

The law in force at the time this deed was executed contains the follow-

ing provisions, respecting the conveyance by a married woman of her real estate: "A married woman may convey any of her real estate, by any conveyance thereof executed by herself and husband, and acknowledged by such married woman, and certified in the manner hereinafter prescribed by some court authorized by this act to take and certify such acknowledgment."

"No such acknowledgment shall be taken unless such married woman shall be personally known to at least one judge of the court taking the same, to be the person whose name is subscribed to such conveyance as a party thereto, or shall be proved to be such by at least one credible witness; nor unless such married woman shall be made acquainted with the contents of such conveyance, and shall acknowledge, on an examination apart from her husband, that she executed the same freely, and without compulsion or undue influence of her husband.

"The certificate of such acknowledgment shall set forth that such married woman was personally known to at least one judge of the court granting the same, to be the person whose name is subscribed to such conveyance, as a party thereto, or was proved to be such by at least one witness (whose name shall be inserted in the certificate), and that she was made acquainted with the contents of such conveyance, and acknowledged, on an examination apart from her husband, that she executed the same freely, and without compulsion or undue influence from her husband." Revised Statutes of 1843, chapter 54, sections 24, 27, 28.

At common law a wife could convey her real estate only by uniting with her husband in levying a fine, which, being a solemn proceeding of record, the judges were supposed to watch over and protect her rights, and ascertain by a private examination that her participation was voluntary.

The mode prescribed in the statute above set out, and which is generally adopted in this country, of alienating the property of a *feme covert* by a deed acknowledged apart from her husband, is a substitute for the common law fine, and is an enlargement of the power of alienation. But in order that her deed may be operative to any extent, and for any purpose, it is necessary that it shall conform fully with the statute. Independent of the statute she has no power to convey.

From an examination of the deed in question, it appears that the name of Rebecca Heaton nowhere appears in the body of the deed, although her name is signed to it; and further, that the acknowledgment omits to state *that she was made acquainted with the contents of such conveyance.*

The courts have uniformly held that either of these defects renders the deed void, and incapable of enforcement against the wife. We have not been able to find a single case which admits of the correction of such defects in a court of equity.

I. In *O'Ferrall* v. *Simplot*, 4 G. Greene, 162; *S. C.* 4 Iowa, 381, an acknowledgment with the above omission was held to be fatally defective.

In *Silliman* v. *Cummins*, 13 Ohio, 116, in which the acknowledgment failed to state that the defendant, a married woman, was made acquainted with the contents of the deed, the court employed the following language:

"A married woman has no legal existence or power to transfer her interest in real estate, except through the statutory channel. The mode of executing the conveyance confers upon her the power to convey. Where the power exists independent of its mode of execution, and has been defectively executed, it is not a case of want of power, but of defective execution, which a court of equity will aid. But where the power and mode of execution are inseparable, the power resulting from the mode, and that mode has not been pursued, it is not a case of defective execution, but a want of power which a court of equity cannot aid. Hence, when a married woman attempts to convey, and lacks power from not pursuing the mode prescribed, courts of equity will not relieve, because to amend the mode is to create the power." And in this case it was held that the deed did not pass the estate of the wife, and that a court of equity could grant no relief. In *Grove* v. *Zumbro*, 14 Grattan, 501, Mary Zumbro and John Zumbro her husband deeded the land to the defendant in 1833. In 1850 John Zumbro died, afterward Mary brought her action in equity to recover the land. The cause was tried in 1856. The certificate of acknowledgment did not comply with the statute, in that it failed to state *that she did not wish to retract it.* The deed was held inoperative, and she was held entitled to recover the land.

To the same effect is *Watson* v. *Bailey*, 1 Binn. 470, in which it was held that the omission of the word *voluntary* in the acknowledgment of the wife rendered the deed inoperative to pass the title to her lands, and that it is not admissible to prove her parol declaration that she executed the deed voluntarily, and if it was not sufficient would execute and acknowledge it again, or do any act to make the deed good.

In *Dewey* v. *Campau*, 4 Michigan, 565, the court used this language: "The deed of a *feme covert* conveying her interest in lands which she owns in fee does not pass her interest by the force of its execution and delivery, as in the common case of a deed by a person under no legal disability. But the law presumes that a *feme covert* acts under the coercion of her husband, unless by a separate acknowledgment out of the presence of her husband, before some officer duly authorized to take such acknowledgment. The deed of a *feme covert* being void at common law is a nullity, unless acknowledged in strict compliance with the statute. The acknowledgment as to her is a part of the deed." To the same effect is *Pratt* v. *Battels*, 28 Vt. 685. *Russell* v. *Rumsey*, 35 Illinois, 362, was an action for the recovery of dower. The deed was both executed and acknowledged by the wife, but the certificate of acknowledgment failed to state that the wife relinquished her dower in the premises. In holding that her dower was not barred, the court employed the following language: —

"It is urged that a widow claiming dower under such circumstances acts in bad faith. This may be true, but the law is not designed to regulate morals of individuals who violate no law. Also, that she knew when she executed the deed that the purchaser expected to obtain a release of her dower, and that she must have designed to bar it by her act. The same might be said with equal truth, if she had only signed the deed, and acknowledged it in the presence of a subscribing witness; and yet it would not be contended that her dower would thereby have been released,

nor could witnesses be called to prove the fact. The statute has, in lieu of the more solemn mode of barring dower by fine or recovery, adopted the examination and certificate of the officer. When this change was made it can hardly be supposed that any requirement imposed would be regarded as merely formal and directory. In so great and important a change in the mode of barring dower, it would of course lead to the adoption of acts deemed sufficient, but to no more than was deemed essential. The wife is unable to bar her right of dower except by conforming to the requirements of the statute. Nor has equity jurisdiction to specifically execute the contract of a *feme covert*, whether for the relinquishment of her dower, or the conveyance of her real estate. If there has been a mistake by the officer, or the *feme covert* has acted in bad faith, it is the misfortune of the grantee to have received a deed inoperative to pass the dower. He is presumed to know the law, and when he received such a deed it may as readily be inferred that it was with his assent, as that the wife designed to perpetrate a fraud. On the production of the officer's certificate, the presumption will be indulged that it contains a statement of all the acts that were done, and that none were omitted. It is for the grantee to be satisfied that the deed is properly acknowledged. If he neglects his duty it is his fault as well as his misfortune."

In *Martin* v. *Dwelly*, 6 Wendell, 9, the acknowledgment of the wife to a conveyance was defective. In this case Mr. Senator Beardsley said: "It is not pretended that the present conveyance is of any effect except as evidence of an agreement that a court of equity will enforce; and in this respect it is nugatory, because the law adjudges it to have been made at the instance of the husband. If chancery will enforce such an agreement, I can imagine no barrier that can be erected against the encroachment of the husband, or for the protection of the wife. It filters away the statute, and makes it a dead letter." See also *Lane* v. *Dolick*, 6 McLean, 200.

We are aware that an act of the Seventh General Assembly, which took effect July, 1858, purports to render valid all acknowledgments taken prior to that time, notwithstanding the provisions of the law in force at the time they were taken. Revision, section 2249.

However effectual this statute may be in its application to deeds which are operative as conveyances without acknowledgment, the acknowledgment being necessary only to admit the conveyance to record, and to constitute constructive notice of its execution, it cannot render a deed valid which was executed in such manner as to be void. This is clear upon principle, and it has been judicially determined.

In *Good* v. *Zercher*, 12 Ohio, 364, respecting this question, the court held as follows: "Under our constitution the legislature has not power to enact laws that shall pass the land of a married woman by an instrument not binding upon her at the time of its execution. The act passed March 9th, 1835, to render valid acknowledgments certified prior to that time, which omit to state that the deed was read, or contents made known to the wife, is unconstitutional, inoperative, and void as to deeds executed by married women under the act of 1820, requiring such deed to be read, or contents made known." The same point was ruled in *Russell* v. *Rumsey*, 35 Illinois, 362. The reasoning of these courts is equally applicable to our constitution.

2. The omission of the name of the wife in the body of the deed is equally fatal to it as a conveyance of her estate.

In *Sharp* v. *Bailey*, 14 Iowa, 887, it was held that a deed executed substantially in the form of the one under consideration was ineffectual as a conveyance of the homestead, and the court said: "If the subject of the conveyance was her separate property, it seems to us that there could be no fair ground for claiming that she had parted with it by such a deed."

In *Davis* v. *Bartholomew*, 3 Ind. 485, the deed was as follows: "This indenture made the 3d of November, 1829, between Jeremiah Bartholomew and James Davis, of the first part," &c. . . . . "And the said Bartholomew and Davis and their wives do, for their heirs covenant, grant, and agree to and with the said Canada Fink, &c., that they, the said party of the first part, are lawfully seised," &c. . . . . .

"In witness whereof, the said Bartholomew and Davis and their wives have hereunto set their hands and seals the day and year above written.

Signed,

"JEREMIAH BARTHOLOMEW, REBECCA BARTHOLOMEW.
"JAMES DAVIS, MARY DAVIS."

The certificate of acknowledgment recited that the said Rebecca and Mary declared that they signed said deed without compulsion, and that they relinquished all their right and claim to dower. It was held that Mary Davis had not conveyed her dower, and that she was entitled to have it assigned to her. After determining that her name did not appear in the granting clause, and that it was used only in connection with the covenants in the deed, the court employed this language: —

"The effect of this deed, therefore, is the same as if the complainant had not been mentioned at all in the body of it. Her signature and seal are to the deed, but they are not sufficient of themselves to bar her claim. *Cox et al.* v. *Wells*, 7 Blackford, 410. Nor is the complainant barred of her dower by the circumstance that the justice's certificate states that she acknowledged before him that she had voluntarily relinquished her right of dower. The deed itself must contain the words necessary to constitute a conveyance of release, or the claim of dower is not barred." Citing 4 Kent's Commentaries, 59. In *Carr* v. *Williams*, 10 Ohio, 305, it was held that a deed in the body of which the names of the grantors were not inserted, the blanks in the printed form not being filled, could not in equity be corrected against the wife.

In *McFarland* v. *Febyer's Heirs*, 7 Ohio, 194, a deed as follows: "This indenture between S. McFarland and Catharine McFarland his wife, of the first part, and the Bank of the United States, of the second part, witnesseth, that S. McFarland, for and in consideration," &c., "hath sold," &c., running all through the operative parts as the single acts of S. McFarland, and concluding thus: "In witness whereof said Stephen and Catharine have hereunto set their hands and seals;" signed and duly acknowledged by both, was held inoperative as to the wife.

In *Cincinnati* v. *Newell's Heirs*, 7 Ohio State, 37, it was held, that where the wife is owner in her own right of a portion of the premises conveyed, and joins her husband only in the *testatum* clause and in the execution of the deed, the husband's title alone passes.

In *Bruce* v. *Wood*, 1 Metcalf, 542, it was held that where a husband, by a deed in his own name only conveys his wife's land in fee, and she merely affixed her signature and seal to the deed, in token of her relinquishment of all her right in the bargained premises, her right in fee is not thereby conveyed, and after the decease of her husband she may maintain a writ of entry, on her own seizin, to recover the land.

In *Catlin* v. *Ware*, 9 Mass. 218, where to a conveyance of land by a husband the wife affixed her signature and seal, her name not being otherwise mentioned in the deed, it was held that she had not thereby barred her right of dower.

In *Foster* v. *Dennison*, 9 Ohio, 121, it was held that a deed by a husband and wife, in which the wife is named only in the clauses relinquishing dower, though duly executed and acknowledged, operates only upon her dower, and will not pass any separate interest she may have in the estate. See also *Payne* v. *Parker*, 10 Maine, 178.

In *Purcell* v. *Goshorn*, 17 Ohio, 105, it was held that a *feme covert*, owner of the land in fee, does not pass her title by a deed executed by husband and wife, and that though it was the intention of husband and wife to execute a deed conveying the fee, a court of equity will not, as against the wife, correct the mistake in the instrument of conveyance, and compel the execution of a perfect deed. See also *Grapengether* v. *Fejervary*, 9 Iowa, 163–173.

We have found no adjudication in conflict with the general effect of these decisions.

They settle, so far as any question can be settled by precedent, both that the omission of the wife's name in the body of a deed is fatal to it as a conveyance of her estate, and that equity will not correct the instrument, nor grant any relief, as against her.

In 1858 the following statute was enacted: "That the several courts of chancery in this State shall be authorized and empowered to correct, amend, and relieve against any error, mistake, or defects occurring in the deed, or other conveyance, of any husband and wife, hereafter to be executed and intended to convey or incumber the lands or estate of the wife, or her right of dower in the lands of her husband, in the same manner and to the same extent as the said courts are, or shall be authorized or empowered to correct error, mistakes, or defects in the deeds or conveyances of any person." Revision, section 2257.

This statute recognizes the existence in this State of the common law rule respecting the deed of a married woman, and expressly limits the power therein conferred to correct her conveyances, to those executed *after* its enactment.

The deed being insufficient to pass the estate of Rebecca Heaton, the lack of power to correct her conveyance must be conclusive against appellant, unless the plaintiff's cause of action is barred by the statute of limitations. . . . .

COLE, J., dissenting. The original opinion of the majority, in this case, was based upon the points made by counsel in the cause; and it held that the court could not correct the error in the deed. The following dissenting opinion was prepared to file in connection with that original opinion:

The point that the acknowledgment was defective was never made by counsel, either in the court below or in this court. The concluding paragraph of this dissenting opinion presents my views upon that question. There is no controversy respecting the real facts of the case. In this opinion some of the facts omitted from the statement in the majority opinion are stated fully. The facts are as follows: This is an action for the recovery of real property, the east half of the northeast quarter of section thirty-four, township seventy-eight, range two, west. The land was entered by Peter Fryberger, May 22, 1839, who gave the same by parol to his daughter, Rebecca Heaton, wife of Silas Heaton, prior to 1845, but did not convey the same to her till April 29th, 1853. The defendant, who was a brother of Rebecca, purchased the land of Rebecca and Silas Heaton, and paid them therefor one hundred dollars, and at the same time they made to him a deed for it as follows: "This indenture, made this 17th day of April, in the year 1845, between Silas H. Heaton, of the county of Muscatine, and Iowa Territory, of the first part, and Moses Fryberger, of the county of Muscatine, of the second part, witnesseth: That the said party of the first part, for and in consideration, &c. (being regular in form and with covenants of warranty, and concluding), In testimony whereof the said party of the first part *have* hereto set *their hands and seals*, on the day and year first above written." This deed was duly signed, and sealed by both Silas and Rebecca Heaton, and was also acknowledged by "the persons whose names are subscribed to the foregoing instrument as parties thereto," and was also recorded the next day. Rebecca Heaton died in 1857, and Silas H. died in 1869. Plaintiffs are their children, and claim the land as heirs of their mother.

The defendant, by answer, pleaded a general denial and the statute of limitation, and for equitable defence set up a mistake in writing the deed, whereby the name of Rebecca Heaton was omitted from it. The testimony shows that the defendant was never a resident of Iowa, but always of Ohio; that he took possession as owner of the land directly after his purchase, began improvements thereon, and had occupied the same by his tenants, by residence, and cultivation of crops every year, and had paid taxes thereon up to the commencement of this action, December 1, 1869, claiming title thereto; that plaintiff's ancestors lived near the land till they died, and never claimed any interest in it, but recognized it as defendant's. There was a trial to the court without a jury, the equitable defence was dismissed, and judgment rendered for plaintiff for possession, and for $378.35 damages. The defendant appeals.

The testimony in the case is all before us, and from it there is scarcely room for any reasonable doubt that the defendant purchased and paid for the land in controversy, and that it was the purpose and intent of both of the plaintiff's ancestors to convey the same fully and absolutely to him, and that the name of Rebecca Heaton was omitted from the deed by reason of a mistake. The single question, therefore, presented upon the equitable defence is, whether a court of equity has the power to correct such a mistake in the deed of a married woman, made prior to the enactment of our statute, which declares that "a married woman may convey her interest in real estate in the same manner as other persons." Rev. sec. 2215. There is no controversy between counsel respecting the sufficiency

of the execution and acknowledgment of the deed by the wife, or that it would have conveyed the absolute title, fully and completely, if the name of the wife had been inserted in the deed immediately before or after the name of the husband.

At the common law, the legal existence of the wife was so completely merged in the husband as that she could make no contract, nor could she bind herself or property by any obligation. Hence her conveyance of her own real estate was absolutely void — a nullity. Under the influences of a higher civilization, the power or authority to contract, with certain limitations and guards, has been conferred upon the wife, and enlarged from time to time. Primarily, she was empowered to convey her real estate by a *quasi* judicial proceeding, called a fine and recovery. In the states of this country, as a general rule, she was, by statute, empowered to convey, by joining her husband in a deed, and acknowledging, separate and apart from him, its execution to be her free and voluntary act and deed. This was substantially the law in force here when the deed in controversy was executed, except that instead of *joining* her husband in a conveyance, it is provided that it shall be by deed "executed by herself and husband." Rev. St. 1843, ch. 54, secs. 26, 27, 28.

It has been held with great uniformity and upon the soundest reasoning, that unless the deed was executed and acknowledged in the manner prescribed by statute, it did not convey her title or interest. *Silliman* v. *Cummins*, 13 Ohio, 116; *McCann* v. *Edwards*, 6 B. Mon. 208; *Lane* v. *Dolick*, 6 McLean, 200; *Davis* v. *Bartholomew*, 3 Ind. 485; *Grove* v. *Zumbro*, 14 Gratt. 501; *Watson* v. *Bailey*, 1 Binn. 470; *Pierce* v. *Wanett*, 6 Jones (N. C.), 162; *Stone* v. *Montgomery*, 35 Miss. 83; *Delassus* v. *Poston*, 19 Mo. 425; *Dewy* v. *Campau*, 4 Mich. 565; *Russell* v. *Rumsey*, 35 Ill. 362; *Lane* v. *Soulard*, 15 Ill. 123; *O'Farrell* v. *Simplot*, 4 G Greene, 162; *S. C.* 4 Iowa, 381. And with almost equal uniformity, and upon quite as cogent reasoning, it has been held that a failure to comply with the requirements of the statute, at least substantially, renders the deed inoperative as to the wife for any purpose, as well in equity as at law, and that it cannot be enforced as an agreement to convey, either as against her or her heirs. *Martin* v. *Dwelly*, 6 Wend. 9; *Wooden* v. *Morris*, 2 Green's Ch. 65; *Butler* v. *Buckingham*, 5 Day (Conn.), 492; *Lane* v. *McKeen*, 15 Maine, 304; *King* v. *Mosely*, 5 Ala. 610: *Knowles* v. *McCamly*, 10 Paige Ch. 342. Where the wife had agreed to sell to one who took possession, and then conveyed to another, the latter was required to convey to the former, and the note he gave to the wife in consideration for it was cancelled. *Warner* v. *Sickles*, Wright (Ohio), 81. And, as respects the certificate of acknowledgment, it has been held that if it was defective in form it could not be corrected, even upon parol proof that the acknowledgment was in fact according to the statute. *O'Farrell* v. *Simplot*, 4 Iowa, 381, *supra*, and cases there cited. And in other cases it has been held that the certificate of the officer of the acknowledgment is conclusive evidence of the facts it states. *Baldwin* v. *Snowden*, 11 Ohio St. 203. And again, that it is only conclusive against a *bonâ fide* grantee, *Louden* v. *Blythe*, 27 Pa. St. 22; and also, that it is only *primâ facie* true, *Fleming* v. *Potter*, 14 Ind. 486. And the deed of the wife is good if executed in the manner prescribed by statute, although no part of the

consideration should go to her, *McFerrin* v. *White*, 6 Coldwell, 499; or even if it is without consideration it passes her title, *Goundie* v. *Northampton Water Co.* 7 Barr, 233.

Unless the deed contains such words as are necessary to pass the estate of the wife, it will not operate to convey her title or interest, even though she join in its execution and acknowledgment, *McFarland* v. *Febiger's Heirs*, 7 Ohio 194; *Cincinnati* v. *Newell's Heirs*, 7 Ohio St. 37; *Bruce* v. *Wood*, 1 Met. 542; *Catlin* v. *Ware*, 9 Mass. 218; and if she joins in such deed which states that she relinquishes her right of dower, it will only operate to pass her dower, and will not affect her fee title therein, *Foster* v. *Dennison*, 9 Ohio, 121; or her homestead right, *Sharp* v. *Bailey*, 14 Iowa, 387. See also *Mayo* v. *Feaster*, 2 McCord Ch. 137; *Hughes* v. *Wilkinson*, 21 Ala. 296; *Payne* v. *Parker*, 10 Me. 178.

And it has been a well settled rule, under these statutes, that a mistake in the manner of the execution or acknowledging of deeds by the wife cannot be corrected in equity, *Martin* v. *Dwelly*, 6 Wend. 9; *Butler* v. *Buckingham*, 5 Day, 492; *Grapengether* v. *Fejervey*, 9 Iowa, 163; *Carr* v. *Williams*, 10 Ohio, 305; *McFarland* v. *Febiger's Heirs*, 7 Ohio, 194; *Wilkinson* v. *Getty*, 13 Iowa, 157; and this for the plain reason that a mistake in the manner of executing or acknowledging a deed by a married woman amounts to a failure to execute it at all. That is, unless she complies with the statute she has not executed the deed, for she has no power or authority to execute it in any other way. A failure to execute a deed by a married woman on account of non-compliance with the requirements of the statute, whether such failure occur by mistake or otherwise, is, in its legal effect, just like the failure of any other person to execute a conveyance. Suppose an adult male makes an agreement in parol to execute a deed for certain real estate, and he takes his pen and prepares the instrument, but by mistake or oversight he fails to execute it (to sign it, that is); could a court of equity correct this mistake of his, and create a conveyance which should bind him? Surely not; for he is not bound under his parol agreement, by reason of the statute of frauds, and he is not bound by his deed, for he has not executed it, and it makes no difference whether his failure to execute it was the result of a mistake or a purpose. Until he does execute it he is not bound by it, and a court of equity possesses no power to make a contract for him under the pretext of correcting a mistake, any more than it would under the pretext of correcting his purpose. Until he makes or executes a contract he is not and cannot be bound by it. When he has executed it, a court of equity possesses plenary power to correct any errors or mistakes occurring therein.

It is upon this principle that courts of equity have ever refused to interfere and correct very manifest mistakes in the execution of conveyances by married women. They have, in substance, said that a failure to comply with the mode prescribed by statute for the execution of such instruments by married women, whether it resulted from mistake, oversight, or purpose, was, in legal effect, a failure to execute it; and the instrument not being executed by her, did not bind her, and there is no power in a court of equity to execute a contract for her, or to compel her to execute one. She has power to execute it in a particular way, and until she does so execute it she has not executed it at all, and is not bound by

it. But when she does execute it in the manner pointed out by statute, she is as effectually bound by it as an adult male, and if in reducing the contract to writing, or in drawing it up, there has been a mistake, a court of equity possesses just as plenary power to correct such mistake as it does to correct a mistake in any other contract executed by any other person having power to execute it. All valid contracts, made by persons having power to make them, stand, in this respect, upon the same footing, and the power of a court of equity to correct mistakes in any of them rests upon the same basis.

If, in the case before us, the land had by mistake been described as the west half of the section instead of the east half, the deed being otherwise complete, it seems to me there could be no reasonable doubt of either the power or the duty of a court of equity to correct the mistake. The right and duty of a court to correct the mistake, in omitting the name of the wife from the body of the deed, rests upon the same principle. The effect of either mistake is precisely the same, to wit: no title passes to the grantee. The right to correct either mistake rests upon the most solid reasons; and the duty to do it rests upon the most unquestionable equity. *McCall* v. *McCall*, 3 Day, 402.

There are no cases, which have fallen under our observation, that are in direct conflict with the foregoing views, unless it may be the case of *Purcell* v. *Goshorn*, 17 Ohio, 105, and the case of *Moulton* v. *Hind*, 20 Ill. 137; and in this last case the fact of mistake was denied by sworn answer, and no evidence of it was before the court, so that the question was not properly presented; and besides this, the cases cited do not support the ruling. In the case of *McFarland* v. *Febiger's Heirs*, 7 Ohio, 194, a suit in equity for dower, the wife, who was not owner of the fee, and whose name was not contained in the granting clause of the deed, nor was there any relinquishment of dower, joined her husband in its execution. In answer to interrogatories by the grantee, she testified, "that she was apprised before she executed the deed that it was insufficient to deprive her of her dower, and that she executed it in this belief, and would not have executed it at all had she considered it as extinguishing her rights." The court held that the deed did not bar her dower. In a note to this case by the editor of a late edition, M. E. Curwin, Esq., it is said: "The profession, I believe, have not generally been disposed to put so favorable construction on the complainant's case, here reported, as the judge who pronounced the opinion of the court. It seems to them that the claim for dower was made under circumstances of great injustice; and after repeated efforts to break down the decision had failed, the legislature provided that a court of chancery might thereafter correct mistakes in deeds made by husband and wife, as well as in other deeds. The immediate occasion of this law was the decision of *Purcell* v. *Goshorn*, 17 Ohio, 105."

In the case referred to in the note, *Purcell* v. *Goshorn*, the court concludes its opinion with this sentence: "But all this, we think, does not prove that here is only a clerical mistake which needs to be rectified." And in the case of *Carr* v. *Williams*, 10 Ohio, 305, which was one of the efforts to break down the decision in *McFarland* v. *Febiger's Heirs*, the court refused to correct the mistake, on the ground that the mode pre-

scribed by the statute for executing the conveyance had not been complied with (p. 310). And while we regard that view of the case as quite too narrow, we confess that it puts the decision upon a very tenable basis. The act of the Ohio Legislature was passed April 17, 1857, and provided that the courts of the State "shall be authorized and empowered to correct, amend, and relieve against any errors, defects, or mistakes occurring in the deed or other conveyance of any husband and wife *heretofore or* hereafter to be executed, and intended to convey or incumber the lands or estate of the wife, or her right of dower in the lands of her husband, in the same manner, and to the same extent as the said courts are or shall be authorized or empowered to correct errors, mistakes, or defects in the deeds of conveyance of any other persons." The act of the Iowa Legislature became a law March 8, 1858, and is a literal copy of the Ohio act, except the words "heretofore or," as above italicized, are omitted. Rev. sec. 2257.

After the enactment of the Ohio statute, the same case came before the supreme court of that State, and the chief, and really the only point considered by the court, was the constitutionality of the retrospective clause of the act. The court held it constitutional, and confirmed the rights of the grantee under the conveyance. This ruling was approved in *Miller* v. *Hine*, 13 Ohio St. 565, and was both approved and followed in *Smith* v. *Turpin*, 20 Ohio St. 478. The effect of these decisions is to give to the courts power to correct a defective execution of a deed for real estate when the "parties intended to convey" it; a power which the courts did not otherwise possess, and which, but for the peculiar provisions of the Ohio constitution, art. 2, sec. 28, the legislature might not be able to make retroactive. But the general power to correct errors or mistakes in *executed* instruments and the like was not only originally inherent in courts of chancery, but the necessity for the judicial exercise of such power was among the leading causes which called such courts into being.

Whenever a person has authority to make a contract or conveyance, either generally or within prescribed limits, and it has been executed pursuant to the authority, the inherent power of a court of equity is adequate to the correction of any mistake in it, without legislative aid. But since the legislature prescribes the mode and manner, or the circumstances under which married women have authority to make contracts and conveyances, the power to correct errors or mistakes in the efforts to exercise the authority properly comes from the legislature. The district court then should have corrected the mistake in the deed, and quieted the title in the defendant. . . . . *Judgment affirmed.*

CIRCUIT COURT U. S. — EASTERN DISTRICT OF MICHIGAN.

[MARCH TERM, 1874.]

LIFE INSURANCE. — INSANITY DEFINED AND EXPOUNDED. — SUICIDE.

MOORE v. *CONNECTICUT MUTUAL LIFE INSURANCE CO.*

Construction of the words "die by his own hand" in a policy of life insurance.
Presumption as to death and sanity of the deceased.
Insanity defined, and discussion of the degree of derangement that is necessary to avoid a policy of life insurance containing a provision that the insurer shall not be liable in case of suicide.

CHARGE to the jury by LONGYEAR, J.

Gentlemen of the jury: After the very full, able, and exhaustive argument of counsel on both sides in this case, with the full, and, I feel, entirely fair discussion of all the details of the facts occurring in it, it seems unnecessary that I should detain you any longer than to lay down those rules of law which are to be your guidance in your deliberations. I shall therefore proceed as briefly as possible to lay down those general rules, with perhaps some few additional remarks, but in doing so shall detain you as short a time as possible.

This suit is brought by Lottie A. Moore, the wife of Everett W. Moore, to recover the amount of a policy issued by the defendant to her on the life of her late husband for $5,000. The contract itself is not disputed, but there is a clause in it that raises the whole question in this case, and that clause is as follows: "If the assured shall die by his own hand," &c., "this policy shall be void and of no effect."

That the assured took his own life there is no dispute. The simple question is, whether the circumstances under which he took his own life are such as to bring the case within that provision of the policy — that is, was it within the sense of the words "die by his own hand," as these words were used in the policy?

These words, "die by his own hand," mean the same as suicide, in general terms. That was decided in the case of the *Life Insurance Company* v. *Terry*, 15 Wallace, 591; *S. C.* 2 Ins. Law Jour. 540; 6 Am. L. T. R., which has been laid before you here, and it has been seen all the way through in the argument of this case, and from the books which have been read, that the discussion of this very clause, and the words similar to it, proceed upon the same principles and upon the same general considerations as suicide; and, consequently, I call your attention in the first place to the definition of suicide as bearing upon the questions here under consideration, and I will read that from the fourth of Blackstone, page 189. Suicide was placed, as long ago as the time when Blackstone wrote, and still stands there by the English law, and also so far as it is recognized and provided for or against in this country, as felonious homicide. It is placed in the same category as murder, and I read from Blackstone as follows: —

"Felonious homicide is an act of a very different nature from the former" (that is, of excusable homicide), "being the killing of a human creature of any age or sex without justification or excuse. This may be done either by killing one's self or another man.

"Self-murder, the pretended heroism but real cowardice of the Stoic philosophers, who destroyed themselves to avoid the ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law, yet was punished by the Athenian law with the cutting off the hand which committed the desperate deed. And also the law of England wisely and religiously considers that no man hath a power to destroy life but by commission from God, the author of it; and, as the suicide is guilty of a double offence, — one spiritual in evading the prerogative of the Almighty, and rushing into his immediate presence uncalled for, the other temporal, against the king, who hath an interest in the preservation of all his subjects, — the law has, therefore, ranked this among the highest crimes, making it a peculiar species of felony — a felony committed on one's self; and this admits of accessories before the fact as well as other felonies, for if one persuades another to kill himself, and he does so, the adviser is guilty of murder."

Now comes the definition of suicide, which I desire to call your particular attention to: —

"A *felo de se*, therefore, is he who deliberately puts an end to his own existence, or commits any unlawful, malicious act, the consequence of which is his own death; as if attempting to kill another he runs upon his antagonist's sword, or shooting at another the gun bursts and kills himself. The party must be of years of discretion and in his senses, else it is no crime."

That this party was of years of discretion there is no dispute. The only dispute in this case is as to his being in his senses when he committed the act. In regard to this, sanity is presumed. All persons are presumed to be sane until the contrary is proven. Insanity must always be proven by the party claiming an exemption on account of it. The fact of suicide is not of itself evidence of insanity. That, however, is not disputed, and I need not stop to discuss it to any length whatever.

This covers the first and second of the defendant's requests to charge, which I will here read for the purpose of disposing of them.

The defendant requests the court to charge the jury: —

1. "It being admitted that the assured, Everett W. Moore, destroyed his own life, it is a presumption in fact that he died 'by his own hand,' and in the sense of the policy, and the burden of proof is upon the plaintiff to show that he came to his death under such circumstances as makes the defendant liable under the policy."

This is correct, and I so charge you.

2. "There is no presumption arising from the act of self-destruction that it was the result of insanity, and the burden of proof is upon the plaintiff to prove that at the time of the death of the said Everett W. Moore he was insane to such a degree that the defendant is liable upon the policy."

This is simply the proposition that I have already stated, with, however, perhaps a very little qualification. The charge, as I give it to you,

is that suicide is not of itself evidence of insanity, standing alone by itself; and the burden is upon the plaintiff in this case to show that insanity existed, and that it was of such a nature and degree as to make the company liable. I will therefore next call your attention to the degree of insanity that will not or that will excuse or exempt the party from the provision in the policy.

First, it is not every degree of insanity that will exempt the party taking his own life from the consequences of the act. A person may from anger, jealousy, shame, pride, dread of exposure, fear of coming to poverty, or the desire to escape from the ills of life be considered in a certain sense insane; but these alone are not enough to exempt him from the consequences of self-destruction, where he committed the act deliberately and intelligently.

In regard to this it is sufficient to explain that an error of judgment as to the commission of the act is not sufficient to exempt the party, — a mere error of judgment; for we may say that all men, perhaps, who decide to take their own lives, when they do it deliberately and intelligently, commit an error of judgment. That is not sufficient to exempt them.

Mental disorder amounting to insanity must appear in order to exempt the party. But while these causes which I have named are not sufficient alone (such as anger, dread of exposure, a desire to escape from the ills of life, &c.) to exempt the party from the consequences of suicide, there undoubtedly may be circumstances under which these, operating together with other circumstances upon the mind, may produce a disorder of the mind. And that is for the jury to determine in every case. Where they have produced a disorder of the mind, then it is that which you are to consider, and not the mere peculiar causes which produced it. And in this connection I will notice the third, fourth, and fifth of the defendant's requests, and the plaintiff's first request.

The plaintiff requests the court to charge the jury: —

"That if the death of the deceased was not his voluntary, intelligent act, he did not die by his own hand within the meaning of the policy."

That is correct as a general principle, and I so charge you.

The defendant's third request is as follows: —

"If the assured being in possession of his ordinary reasoning faculties, and from shame, pride, a dread of exposure, or a desire to escape from the ills of life, intentionally took his own life, there can be no recovery."

This I have already explained to you.

The fourth request is: —

"If the assured was embarrassed in his business, or had drawn checks without having any funds upon which to draw, or had committed forgeries and exposure was imminent, or was in a distressed state of mind from this or some other cause, and for any or all of these reasons he formed a determination to take his own life, because in the exercise of his usual reasoning faculties he preferred death to life, then the company is not liable."

This is undoubtedly correct, and I so charge you. If for these reasons he took his own life in the exercise of his usual reasoning faculties, then the company is not liable.

5. "It is not every kind or degree of insanity that will so far excuse the act of self-destruction as to make the company liable."

I have already covered this in my charge. I merely read these now for the purpose of disposing of them.

Thus far there is no great difficulty in applying the law to any given case, or to this case. You will next proceed to the question of the degree of insanity that will excuse. Here the difficulty in cases of this kind begins, and your real burdens in this case commence. The court can aid you but little in this respect, further than to lay down the general principles by which you are to be governed. These have been well defined by the highest court of judicature in this country, by whose decision this court and jury must be governed. They are well set forth in the requests of the respective counsel.

I will now read the sixth and seventh requests of defendant's counsel, which are as follows: —

6. "To have this effect (that is, that insanity shall have the effect to excuse the act) the mind must be so far deranged as to have made the deceased incapable of using a rational judgment in regard to the act of self-destruction."

That is correct, and I so charge you.

7. "To make the defendant liable, the plaintiff must prove either first that the assured was impelled by an insane impulse which the reason that was left him did not enable him to resist, or secondly that his reasoning powers were so far overthrown that he could not exercise them on the act which he was about to do."

This request is correct law, and I so charge you.

The plaintiff's second request virtually covers the same ground, and I will simply read it for the purpose of showing that fact, and for the purpose of disposing of it.

"If the deceased was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties in the act he was about to do, the company is liable."

That is correct, and I so charge you.

I will now dispose of plaintiff's third request, as to which there is some dispute between the counsel. The request is as follows: —

"If the death was caused by the voluntary act of the deceased, he knowing and intending that his death would be the result of his act, and when his reasoning faculties were so far impaired that he was not able to understand the moral character, general nature, consequences and effect of the act he was about to commit, or if he was impelled thereto by an insane impulse which he had not the power to resist, such death was not within the contemplation of the parties to the contract, and the insurer is liable."

The last part of the request is included in the second request, and it can be just as well stricken out, and I will leave it out for the purpose of perspicuity in considering this particular request. I will read it again, leaving out that last clause: —

"If the death was caused," &c., "when his reasoning faculties were so far impaired that he was not able to understand the moral character, the general nature, consequences and effect of the act he was about to commit, the company is liable."

That is the request which the court has been asked to give. The criticism upon this request by defendant's counsel is, in the first place, that although so declared by the supreme court of the United States in the case of *The Insurance Company* v. *Terry*, above cited, it was merely dictum; that it was not included in the points presented to the court for decision, and consequently is not binding upon this court; and that it is not good law. If that declaration of the supreme court was within the question presented, it is absolutely binding upon this court and upon you. We will therefore first consider that question.

I think the learned court of appeals of New York, which has made the same criticism on the decision of the supreme court (*Van Zandt* v. *Mut. Benefit Life Ins. Co.*, Ins. Law Jour., March No. 1874, p. 208), and the learned counsel in this case, have overlooked one peculiar feature of the case of *The Insurance Company* v. *Terry*, and that is the refusal of the court below to charge as requested. This precise question was presented in the request to charge, which the court refused to give, and the charge which was given by the court below must be read in connection with and in the light of the requests which had been made and were refused; and that request presenting this exact question of the moral character of the act and of moral insanity, in my opinion was clearly and fully before the supreme court. For the purpose of sustaining that position I will read the request which was refused and in response to which the charge was given, which was given.

The second request on the part of the defendant was: "That if the jury believe, from the evidence, that the said self-destruction of said George Terry was intended by him, he having sufficient capacity at the time to understand the nature of the act he was about to commit, and the consequences which would result from it, then in that case it was wholly immaterial that he was impelled thereto by insane impulse which impaired his sense of moral responsibility, and rendered him to a certain extent irresponsible for his action" — thus presenting the exact question upon which the supreme court passed and which is embodied in the plaintiff's third request.

It is true the court below did not include in express terms in the charge given this question of moral responsibility or of moral insanity, but the terms used in the charge which was given are broad enough to include that; and in view of the fact that the court had been requested to charge otherwise, and then using expressions which are broad enough to include that, it is fair to presume that it was so included, and that the jury so understood.

The language of the charge as given was as follows: "If he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties in the act he was about to do, the company is liable."

This charge must be read in the light of the request which had been refused, and which expressly included the question of moral insanity.

I therefore hold that the question was disposed of finally by the supreme court in a manner absolutely binding upon this court. I therefore give the plaintiff's third request as stated:

These words, "general nature, consequences and effect of the act," have been somewhat criticised, and I deem it my duty to make a few remarks in regard to them, as they are used in that decision. They do not refer to the act, in my opinion, by which the deceased took his life. They are broader than that; they refer to the entire act, — not only the act by which he took his life, but the result of it. That is, they cover the "suicide," the accomplished fact; and that is what is referred to as the "general nature, consequences and effect of the act," — that is, the general nature of the suicide, of the murder committed upon one's self, the enormity and effect of it; otherwise it would be inconsistent with what precedes; because, if it was his voluntary act, he knowing and intending that his death would be the result, then it would be a simple absurdity to put the question to you whether, under those circumstances, if he did not understand the general nature and consequences of the act, the company would be liable. That would be, I say, absurd. Those words then have a broader meaning, and cover the entire accomplished fact, — the act of suicide.

In this view of the case, gentlemen of the jury, it is entirely unnecessary for me to detain you with any remarks or considerations growing out of my own views or opinions as to the correctness of the law as established by the supreme court, and which has just been given you as contained in the plaintiff's third request. I will, therefore, pass it with a single remark, that a considerable time ago, after that case of *The Insurance Company* v. *Terry* had been decided in the court below, but before it was decided by the supreme court, I had occasion to pass upon the same question in the case of *Wolff* v. *The Insurance Company*, and then decided as I now find myself enabled to decide, and my views have not changed upon that subject since that time.

Although I find it nowhere distinctly so stated, yet from the discussions upon the subject, I gather that these defences, as they may be called, to the crime of suicide, are placed upon the same ground so far as this question of the moral character of the act is concerned, as defences for murder. It has always been held that a person killing another when so insane as not to be capable of judging between right and wrong should not be convicted of murder. What I mean is, the principle is the same, although the standard or degree may be different. This is virtually so stated in *The Insurance Company* v. *Terry*, 15 Wallace, 591. This ability to judge between right and wrong refers to a principle of the human mind. It does not refer to any tenets of religious belief. It does not depend at all upon what a man's religious belief may be, or whether he has any or has not. It does not depend upon whether he believes in a God and a future state, or the contrary. It refers to that principle which is planted in every human breast — that sense of right and wrong which exists in the mind of the disciples of Buddha or of Confucius, or of the followers of Mahomet or of Christ, and in the mind of him who believes in none of them. It is that sense of right and wrong that we all feel and realize and understand. It is true that sense is stronger in some persons than in others, but it is that to which reference is had in this connection.

The defendant's eighth request I will now consider.

Counsel for defendant. That is already virtually passed upon by your honor; it is simply refused, as I understand it.

The COURT. Very well, that is all that need be said on that subject.

Defendant's eighth request was as follows: "That the evidence in this case does not tend to show that degree of insanity on the part of the assured which excuses the act of self-destruction and justifies the jury in rendering a verdict for the plaintiff, therefore the verdict must be for the defendant."

Gentlemen of the jury, I have done about all that I can do in this case, and have made these questions as clear as they can be made with the ability I have; and if it is not clear in your minds what your duty is, it rests in the difficulty of making it so, more than in the efforts which have been made by the counsel on both sides, and by the court. The propositions of law that have been stated to you are such as there is no dispute about between counsel, with the exception of the last, and that has been determined by the supreme court, and we must obey. This case, gentlemen of the jury, rests upon presumptions entirely; that is to say, it rests upon the conclusions which you are to draw as to the existence of a certain fact from the proof of the existence of other facts. For insanity and the degree of it are not susceptible of positive proof in a case like this. There are instances in which it may be proven with a great degree of certainty by positive proof, such as in the case of a raving maniac; but here it rests upon presumptions entirely, and your decision of the case depends upon conclusions which you shall draw as to the fact of sanity or insanity from the facts proven. You start out with the presumption of sanity. The burden of proof is upon the plaintiff to prove the contrary. If the plaintiff has sustained that burden, and has so proven to your satisfaction, then she may be entitled to recover at your hands. If she has not, then the defendant is entitled to your verdict.

The first question for you to determine is, do the presumptions arising from the facts proven overcome the presumption of sanity. The trust test is whether the facts proven, from which you are asked to find insanity, are inconsistent with sanity. If they are so inconsistent with the exercise of a sound mind that you cannot reasonably attribute such facts thereto, then they are evidences of insanity, but not otherwise.

Now there is a great range of indications as to soundness or unsoundness of mind, all the way from the ravings of the maniac, which are patent to the eye and the ear, down to the retiring melancholic, who seeks to conceal the worm which is gnawing at his mental vitality. These indications, I say, range all the way between these; and here the difficulty exists in coming to a correct conclusion as to what facts do indicate; but it is peculiarly, and entirely, and exclusively within your province, and I leave it to you without even rehearsing the facts or in any manner deciding them.

Evidence is that which carries conviction to the mind. You are to look at all the facts which have been proven, and to bring to bear upon them your best judgment, aided by your experience and observations in life and considerations to which you have access, without, however, going outside of the proofs in the case, and decide for yourselves whether, in the first place, Everett W. Moore, at the time he took his own life, was sane or

insane. Secondly, if you shall find that he was insane, then whether under the charge that has been already given he was so insane as to excuse or exempt him and this plaintiff from the consequences of the prohibition or disability in the policy. I recommend to you in your consideration to adopt that order. First, the question of insanity in general terms — was he insane? If you decide that he was not insane, then, of course, that is the end of it, and your verdict must be for the defendant. If you shall decide that he was insane, you must go then a step farther, and inquire whether his insanity was of that degree and kind that you are satisfied that he was driven by an irresistible impulse to commit the act, or that he was incapable of exercising his reasoning powers as to the moral character, general effect, and consequences of taking his own life. If, after finding that he was insane, you shall come to the conclusion that he was thus insane, the plaintiff is entitled to recover at your hands; otherwise not. If your verdict shall be for the plaintiff, it will be for $5,000, and interest from the 30th day of December, 1873, to and including the present date.

Counsel for defendant. I desire, growing out of what your honor has said, to make another request: —

"That the mere fact that the assured did not fully understand and appreciate the moral character of the act of self-destruction does not so far excuse the act as to make the defendant liable."

The Court. I cannot see how this varies in any manner the charge as already given, and I therefore refuse this request, with the simple addition that the jury are to take this refusal into consideration, in connection with the charge which has already been given upon that subject.

The jury returned a verdict for the plaintiff for the full amount claimed.

SUPREME COURT OF THE UNITED STATES.

[October Term, 1873.]

CONTEMPT. — DISBARRING ATTORNEY. — POWER OF U. S. COURTS. — MANDAMUS.

IN RE ROBINSON.

1. *The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.*
2. *The act of Congress of March 2d, 1831, entitled "An act declaratory of the law concerning contempts of court," limits the power of the circuit and district courts of the United States to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d, where there has been misbehavior of any officer of the courts in his official transactions; and, 3d, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts.*

3. *The 17th section of the judiciary act of 1789, in prescribing fine or imprisonment as the punishment which may be inflicted by the courts of the United States for contempts, operates as a limitation upon the manner in which their power in this respect may be exercised, and is a negation of all other modes of punishment.*

4. *The power to disbar an attorney is possessed by all courts which have authority to admit attorneys to practice. But the power can only be exercised where there has been such conduct on the part of the party complained of as shows him to be unfit to be a member of the profession; and before judgment disbarring him can be rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence.*

5. *Mandamus is the appropriate remedy to restore an attorney disbarred where the court below has exceeded its jurisdiction in the matter.*

THE facts appear in the opinion.

Mr. Justice FIELD delivered the opinion of the court.

On the 16th day of July, 1873, the grand jury of the Western District of Arkansas reported to the district court of the United States for the district, then in session at Fort Smith, that they had made every effort in their power to have a witness by the name of Stephenson summoned to appear before them; that for this purpose a subpœna for the witness had been placed the day previous in the hands of a deputy marshal by the name of Sheldon, for service; that the deputy marshal, on the same day, went to the town of Van Buren, as he said, to make the service; that after he had left, the witness was seen on the streets at Fort Smith, and the subpœna was on that morning returned unserved; that they had learned from evidence before them that the witness knew that a subpœna was issued for him, and had for that reason come to Fort Smith, "but," continues the report, "after seeing the attorney, J. S. Robinson, in the Nash case, very suddenly absented himself." The jury, therefore, prayed the court to issue an order that the witness, Stephenson, be brought before them.

Upon this report, without other complaint, the court ordered that Sheldon, the deputy marshal, Stephenson, the witness, and Robinson, the attorney, "show cause why they should not be punished as for a contempt."

Two days afterwards, on the 18th of July, the petitioner filed the response to the order of the deputy marshal. The judge then reminded the petitioner that there was also a rule against him, to which he replied: "Yes, sir; I know it and I am here to respond. I don't know what there is for me to answer. It," referring to the report of the grand jury, "says I saw Silas R. Stephenson. I do not know what the grand jury has to do with my private business in my law office," and was proceeding to reflect upon the action of the grand jury, when the judge said: "You must answer in writing, Mr. Robinson;" to which the petitioner replied, "The rule itself does not require me to respond in writing." Upon this the judge said, turning to the clerk, "it should have done so; you will amend the order if it does not, Mr. Clerk." The petitioner declined to answer the rule until it was amended. The judge then said: "Well, I will make the order for you to respond in writing now. Mr. Clerk, you will enter an order requiring Mr. Robinson to answer the rule in writing." Upon which the petitioner said, "I shall answer nothing;" and thereupon im-

mediately, without time for another word, the judge ordered the clerk to strike the petitioner's name from the roll of attorneys, and the marshal to remove him from the bar.

This account of the language used by the petitioner and the judge is taken from the latter's response to the alternative writ issued by this court. The judge states at the same time that the tone and manner of the petitioner were angry, disrespectful, and defiant; and that regarding the words, "I shall answer nothing," and the tone in which they were uttered as in themselves grossly and intentionally disrespectful, as an expression of an intention to disobey and treat with contempt an order of the court, and believing that the petitioner intended to intimidate him in the discharge of his duties, he felt it due to himself and his office to inflict summary and severe punishment upon the petitioner.

The order of the court disbarring the petitioner, made at the time, and entered in the minutes of the court kept by the clerk, was declared by the judge to be erroneous in form, and afterwards, on the 28th of July, a more formal order was entered *nunc pro tunc*. This latter order recites the report of the grand jury mentioned above, the rule to show cause issued thereon why the parties should not be punished as for a contempt, amended from the original order by the insertion of the words, "forthwith in writing and under oath;" and that the petitioner having notice at the time that he was required to respond to the rule, "in a grossly contemptuous, contumacious, and defiant manner," in open court, refused to respond in writing; and then proceeds to decree that, for his contempt committed in open court, as well as for his contempt committed in refusing to respond to the rule, the license of the petitioner as an attorney and counsellor at law and solicitor in chancery be vacated; that the petitioner be disbarred from further practice in the court, and that his name be stricken from the roll of attorneys, counsellors, and solicitors of the court.

Before this amended order was entered the petitioner, through counsel, filed a motion to vacate the judgment disbarring him upon various grounds, which were specified. After its entry a motion to set aside the order as amended was made, in which the petitioner adopted the grounds of the original motion and added others. The substance of the more important of these was, that no charges had been previously preferred in writing and filed against him; that he had had no notice of any charges; that the report of the grand jury contained no charge which he could be required to answer; that no rule had been served upon him to show cause why he should not be disbarred; that he had had no trial previous thereto, and had been denied the right of being heard in his defence; and that the court had no jurisdiction under the circumstances to render the judgment disbarring him.

The petitioner also set up among the grounds upon which he would rely, that the sentence he uttered, "I shall answer nothing," was incomplete, and that he was prevented from finishing it by the action of the judge in interrupting him with the judgment disbarring him; that the sentence completed would have been, "I shall answer nothing until the order to answer the rule in writing shall be served upon me."

The petitioner also disclaimed any intention to commit a contempt of the court, or to act in defiance of its orders or authority at the time, and

averred that he was not conscious of the conduct attributed to him towards the court. This statement was verified by his oath; but the motion was denied.

The petitioner now asks from this court for a mandamus upon the judge to vacate the order disbarring him and to restore him to the roll of attorneys and counsellors. In his petition, which is verified, he refers to the proceedings of the court below, the record of which he produces, and states that in the interview which the grand jury mentioned there was no allusion made to the Nash case or to the grand jury, and that the consultation related to a totally different matter.

The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2d, 1831; 4 Statutes at Large, 487. The act, in terms, applies to all courts. Whether it can be held to limit the authority of the supreme court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But that it applies to the circuit and district courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d, where there has been misbehavior of any officer of the courts in his official transactions; and, 3d, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen, the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes.

If we now test the report of the grand jury by this statute, we find nothing in it which justified any proceeding whatever as for a contempt on the part of Robinson against the court below. No act of his is mentioned which could constitute within the statute a contempt either of the court or of its judge. The allegation that the witness Stephenson, after seeing Robinson, had suddenly absented himself, amounted to nothing more than an insinuation that possibly he may have been advised to that course by Robinson. There was no averment of any fact which the court could notice or the attorney was bound to explain.

Whatever contempt was committed by the petitioner consisted in the tone and manner in which his language to the court was uttered. On this hearing we are bound to take the statements in that respect of the judge, embodied in his order, as true; for the question before us is not

whether the court erred, but whether it had any jurisdiction to disbar the petitioner for the alleged contempt.

The law happily prescribes the punishment which the court can impose for contempts. The 17th section of the judiciary act of 1789 declares that the court shall have power to punish contempts of their authority in any cause or hearing before them, by fine or imprisonment, at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment. The judgment of the court disbarring the petitioner, treated as a punishment for a contempt, was, therefore, unauthorized and void.

The power to disbar an attorney proceeds upon very different grounds. This power is possessed by all courts which have authority to admit attorneys to practice. But the power can only be exercised where there has been such conduct on the part of the parties complained of as shows them to be unfit to be members of the profession. Parties are admitted to the profession only upon satisfactory evidence that they possess fair private character and sufficient legal learning to conduct causes in court for suitors. The order of admission is the judgment of the court that they possess the requisite qualifications both in character and learning. They become by such admission officers of the court, and, as said in *Ex parte Garland*, 4th Wallace, 378, "they hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded." Before a judgment disbarring an attorney is rendered, he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence. This is a rule of natural justice, and is as applicable to proceedings taken to deprive an attorney of his right to practise his profession, as it is to proceedings taken to reach his property. And such has been the general, if not the uniform, practice of the courts of this country and of England. There may be cases undoubtedly of such gross and outrageous conduct in open court on the part of the attorney, as to justify very summary proceedings for his suspension or removal from office; but even then he should be heard before he is condemned. *Ex parte Heyfron*, 7 How. Miss. Rep. 127; *People* v. *Turner*, 1 Cal. 143; *Fletcher* v. *Daingerfield*, 20 Ib. 430; *Beene* v. *State*, 22 Ark. 157; *Ex parte Bradley*, 7 Wallace, 364; *Bradley* v. *Fisher*, 13 Ib. 354. The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged.

That mandamus is the appropriate remedy in a case like this to restore an attorney disbarred, where the court below has exceeded its jurisdiction in the matter, was decided in *Ex parte Bradley*, reported in the 7th of Wallace. It would serve no useful purpose to repeat the reasons by which this conclusion was reached, as they are fully and clearly stated in that case, and are entirely satisfactory.

A peremptory mandamus must issue, requiring the judge of the court below to vacate the order disbarring the petitioner, and to restore him to his office; and it is so ordered.

Mr. Justice Miller dissented.

COURT OF APPEALS OF NEW YORK.

[DECEMBER, 1873.]

INSURANCE. — CONCERNING THE RIGHT OF A MORTGAGEE TO CALL UPON THE INSURER BEFORE EXHAUSTING HIS REMEDY UNDER THE MORTGAGE.

EXCELSIOR INS. CO. v. *ROYAL INS. CO.*

A mortgagee, who has insured his mortgage interest, at his own expense and for his own indemnity, without any agreement with the mortgagor may, in case of loss, call upon the insurer without first exhausting his remedy under his mortgage.

FOLGER, J. delivered the opinion of the court.

Having disposed of several points of minor importance the learned judge proceeds to write: The defendants further claim that Mrs. Connolly having been insured upon her mortgaged interest, the loss sustained by her thereon for which a recovery can be had can be no more than that which the mortgaged property shall fail to secure of her debt; and that as it was proven that the mortgaged property, after the fire, was sold for $11,000, which was more than the amount she had paid on her contract to buy the mortgages, she suffered no loss, and therefore has no claim against the defendants.

We have already stated our opinion, that her insurable mortgage interest, and hence the amount which she might lose, was not limited to the amount actually paid by her on that contract, but that it equalled the whole amount secured and unpaid upon the mortgages for which she was bound to pay. As there was due and unpaid upon the mortgages a sum of over $19,000, even if the premises had been available to her at the price at which they sold after the fire, there was still a deficiency of more than the amount of the defendants' policy. To this the defendants say, that if the plaintiffs' policies are available to Mrs. Connolly for one purpose as she claims, they are available to the defendants for another. They then insist that those policies should share in the payment of the loss, if any there is, and thus, that if the insured must exhaust the remedy against the mortgaged premises, the amount for the defendants to pay will be much less than the amount adjudged against them. If the premises of the defendants' argument are sound, they are right that such consequence would follow. Without deciding whether the policies of the plaintiffs are in existence so as to be available to Mrs. Connolly, and also to the defendants, for the purpose of this argument, we will dispose of the point upon the other branch of it. And this raises the question, whether a mortgagee who has insured his mortgage interest in buildings and fixtures and machinery, at his own expense and for his own indemnity, with no agreement or understanding with the mortgagor, must first exhaust his remedy on his mortgage before he can call upon the insurer to make good any part of the damage by fire to the property.

The learned counsel for the defendants cited, for the affirmation of this

position, Flanders on Ins., p. 360, and Angell on Ins. § 59. Flanders says of an insurance by a mortgagee: "It is not the specific property which is insured, but its capacity to pay the mortgaged debt." Angell says: "It is but an insurance of his debt, and if his debt is afterward paid or extinguished, the policy from that time ceases to have any operation, and even if the premises are after that destroyed by fire, he has no right to recover for the loss, for he has sustained no damage thereby." These texts do not in terms sustain the propositions of the defendants, and it is only as a corollary, if at all, that it can be deduced from them. If it is the debt only which is insured, it may be said that until the debt, or some part of it, is lost, there is no loss upon the policy, and that neither the debt nor any part of it is lost until the mortgagee fails to obtain it from an enforcement of his mortgage. Neither of these writers cites any decision which sustains the proposition of the defendants, except perhaps one. There are *dicta* in several cases which will be referred to. The one case is *Smith* v. *Co. Ins. Co.* 17 Penn. St. 253. There Gibson, J., states as a rule: "A mortgagee insures not the ultimate safety of the whole property, but only so much of it as may be enough to satisfy his mortgage; it is not the specific property which is insured, but its capacity to pay the mortgage debt, and in effect the security is insured." He does also, by way of illustrative enforcement of his argument, say, that a mortgagee insured cannot recover of the insurer for the loss by fire of a few shingles from a building, where the premises are left amply sufficient to secure him his debt. But when this case is closely scanned, it is this: that an insurance of a mortgage interest is an indemnity against a loss of that debt by a loss or damage to the property mortgaged; that if the mortgaged property is, after the loss occurs to it, still enough in value to pay the debt, there has been in effect no loss; that the insurer having paid the mortgage is entitled to have recourse to the mortgaged property, and therefore — and this is the point made on the argument of that case and the point decided — that any concealment of the facts which affects the value of the property is an injury to the insurer and a material concealment which avoids the contract, inasmuch as thereby the insurer is misled as to the value of the property on which he relies for ultimate security and reimbursement. The insurer having several mortgages upon the same property, insured his interest as mortgagee, but did not disclose the existence of but one, which was the last. This it was which was held to be a material concealment, and injurious to the insurer for the reason stated.

We do not understand the learned judges to maintain that an insured mortgagee may not call upon the insurer to pay the loss upon the property as long as the property remaining is enough to satisfy the debt. It is true there are to be found *dicta* of learned and eminent judges, which, it is claimed, go the length of the proposition of the defendants. See *Ætna Ins. Co.* v *Tyler*, 16 Wend. 385–397; 16 Peters, where Chancellor Walworth says: "In the present case all the insurable interest which Schaeffer had in the property . . . . was the amount of his unpaid purchase money, so far as the land upon which the house stood was insufficient to protect him from loss, and provided the purchaser was unable to pay the same." See also *Carpenter* v. *Prov. Ins. Co.* 16 Peters, 495–501,

per Story, J. It is not in either of these cases declared that the mortgagee can claim no more of the insurer than what the security for his debt fails to yield. And if that should be held to be the rational sequence from what is stated, it is certainly to be said, as is said by Shaw, C. J., in *King* v. *State Ins. Co.* 7 Cushing, 1–11, 12, that a principle is stated not necessary to the decision of the cases. *Kernochan* v. *Bowery Ins. Co.* 17 N. Y. 428, is cited also, in which T. R. Strong, J., says: "If the insurance was of the debt, there should, to warrant a recovery, be a loss as to the debt, which has not occurred and cannot take place, as the mortgaged property still far exceeds in value the sum unpaid, and the debtors are solvent."

We do not think that this is a statement of a principle, but an argumentative statement of what would be the result of a supposititious case did it in fact exist, though neither its existence, nor indeed the possibility of its existence under like circumstances, is admitted. Moreover, it was not necessary to the decision of that case, even if it is taken as the statement of a principle.

Mr. Parsons, in his book on Marine Insurance, vol. 1, p. 229, though inclining to the proposition presented by the defendants here, yet says: "We are not prepared to say that whenever the insured interest is a lien, the insurer may interpose as a bar to a claim for a loss the remaining sufficiency of the property to pay the debt." And in his work on Contracts, 6th ed. 2d vol. p. 330–40, though he says, "There is both reason and authority for saying, that in such case he has no claim on the insurer," yet he adds, "This may not be regarded as an established rule." There are some authorities which tend to the contrary. It is apparent that if it is the debt only of the mortgagee which is insured, and that he has no claim against the insurer until the mortgaged property is exhausted; that the same rule will apply as to the obligation of the mortgage debtor, and that the remedy against him must also be first exhausted, yet this proposition does not seem to receive sanction. In *Hancox* v. *Fishing Ins. Co.* 3 Sumner, 132, the same eminent jurist who pronounced the opinion in 16 Peters, *supra*, said: "It has been suggested that the plaintiff has in fact sustained no loss, because, for anything that appears, he may still recover the debt due to him from the seamen, and, if so, he has sustained no loss. . . . . The question is not, in cases of this sort, whether the party has actually lost his debt, ... but is whether he has lost the security for the debt." . . . . In *Russell* v. *Union Ins. Co.* 1 Wash. C. C. R. 409; *S. C.* 4 Dallas C. C. R. 421, it was contended by the defendants, as it is by the defendants here, that the insured might still resort elsewhere than to the insured, and that, therefore, there was no loss. The court did not sustain the position, saying that a loss had actually happened; and that though the lien was not destroyed, yet it was such a loss as that the insured might by an abandonment throw it upon the underwriter. And see *Godin* v. *Lond. Ass. Co.* 1 Burrow, 489. In the absence of direct authority, how is the reason of this matter? Can it be said in any strict or legal sense that the defendants have contracted to indemnify Mrs. Connolly for a loss of her mortgaged debt? whence is their power to guarantee the payment or collection of a debt? Fire underwriters in these days, in this State, are the creatures of statute,

and have no rights save such as the State gives to them. They may agree that they will pay such loss or damage as happens by fire to property; they are limited to this. It was not readily that it was first held that they could agree with a mortgagee or lienor of property, to reimburse to him the loss caused to him by fire. He is not the owner of it; how then can he insure it? was the query; and the effort was not to enlarge the power of the insurer so that it might insure a debt, but to bring the lienor within the scope of that power, so that the property might be insured for his benefit, and it was done by holding, that as his security did depend upon the safety of the property, he had an interest in its preservation, and so had such interest as that he might take out a policy upon it against loss by fire, without meeting the objection that it was a wagering policy. The policy did not, therefore, become one upon the debt and for indemnification against its loss, but still remained one upon the property and against loss or damage to it. It is doubtless true, as is said by Gibson, J., in 17 Penn., *supra*, that in effect it is the debt which is insured. It is only as an effect however, — an effect resulting from the primary act of insurance of the property, which is the security for the debt. It is the interest in the property which gives the right to obtain insurance and the ownership of the debt; a lien upon the property creates that interest. The agreement is usually, as it is in fact in this case, for insuring from loss or damage by fire the property. The interest of the mortgagor is in the whole property, just as it exists undamaged by fire at the date of the policy. If that property is consumed in part, though what there be left of it is equal in value to the amount of the mortgage debt, the mortgage interest is affected. It is not so great, nor so safe, nor so valuable, as it was before. It was for indemnity against this very detriment, this very decrease in value, that the mortgagee sought insurance and paid his premium. To say that it is the debt which is insured against loss is to give to most, if not all fire insurance companies, a power to do a kind of business which the law and their charter do not confer. They are privileged to insure property against loss or damage by fire. They are not privileged to guarantee the collection of debts. If they are, they may insure against the insolvency of the debtor. No one will contend this, and it will be said, it is not by a guaranty of the debt, but an indemnity is given against the loss of the debt by an insurance against the perils of the property by fire. This is but coming to our position, that it is the property which is insured against the loss by fire, and the protection to the debt is the sequence thereof. As it is the property which is insured against loss, it is the loss which occurs to it which the insurer contracts to pay, and for such loss he is to pay within the limit of his liability irrespective of the value of the property undestroyed. So as to the remark, that it is the capacity of the property to pay the debt which is insured; this is true in a certain sense, but it is as a result, and not as a primary undertaking. The undertaking is that the property shall not suffer loss by fire, — that is in effect that its capacity to pay the mortgaged debt shall not be diminished. When an appreciable loss has occurred to the property from fire, its capacity to pay the mortgaged debt has been affected. It is not so well able to pay the debt which is upon it. The mortgage interest, the insurable interest, is lessened in value, and the mortgagee, the insurer,

is affected, and may call upon the insurer to make him as good again as he was when he effected his insurance.

Another consideration: It is settled that where a mortgagee, or one in like position toward property, is insured thereon, at his own expense, upon his own motion and for his sole benefit, and a loss happens to it, the insurer on making compensation is entitled to an assignment of the rights of the insured. This is put upon the analogy of the situation of the insured to that of a surety. If this analogy be made complete, then has the insurer no more right to refuse payment of the loss so long as the insured has other remedy for his debt, than has the surety. One as well as the other, as soon as the creditor's right to make demand is fixed, must respond to it, and seek his reimbursement through his right of subrogation. And indeed the application of this equitable right of subrogation makes our view of this subject harmonious and consistent with all the rights and interests of all the parties.

As we have viewed and treated this case, we are not required to meet the contention of the defendants, that though the two policies of the plaintiffs and the policy of the defendants be treated as subsisting contracts nominally for $15,000, yet as the premium on but half that sum was paid, there was really insured only the amount of $7,500. We have not considered it necessary to pass definitely upon the question, whether Mrs. Connolly could pursue the plaintiffs upon the policies issued by them. The fact that the proofs of loss show that these were insurance upon the property running to James Connolly, the mortgagor, as the insured, but with a memorandum that the loss, if any, should be payable to David Dows & Co., does not affect the relations of the defendants with Mrs. Connolly and her assignees. It does not appear from the proofs of loss that the loss on the policies should be payable to David Dows & Co., as mortgagees of the property, and we are not called upon to make an inference to that effect. They may have had other claims against Connolly, and liens upon his property. This point does not appear to have been raised until the case reached this court. This consideration is of force, for James Connolly, as the insured, had an interest in the policies the loss whereon was payable to Dows & Co., and any loss paid upon them would need be in some way applied to his benefit.

There are other considerations which suggest themselves growing out of the reciprocal rights and obligations of debtor and creditor and insured under such a policy, and of Mrs. Connolly and Dows & Co. under their contract, which cannot have a satisfactory or safe determination without all the facts which both sides might furnish.

The varied suggestions interrogatively put by the learned counsel for the defendants on his points, show that there may be many facts lacking, necessary to a satisfactory solution, and which might perhaps have been produced had the points been made at the trial court. We have considered the many interesting points presented by the learned counsel for the defendants, but are not able to find sufficient ground for the reversal of the judgment appealed from.

All concur, except CHURCH, Ch. J., not voting.

CIRCUIT COURT OF THE UNITED STATES. — EASTERN DISTRICT OF VIRGINIA.

[June, 1874.]

UNCONSTITUTIONALITY OF AMENDATORY BANKRUPTCY ACT OF 1873. — THE VIRGINIA CONSTITUTION AND EXEMPTIONS.

IN RE DECKERT.

The amendatory bankruptcy act of March 3, 1873, is unconstitutional, in that it is not uniform in its operation.

The Constitution of Virginia took effect, so far as it relates to the provisions for exemptions, on the 6th day of July, 1869 — the day it was ratified.

The opinion states the facts.

The opinion of the court was delivered by

Waite, C. J. Deckert was adjudged a bankrupt upon his own petition on the 31st of March, 1873. An assignee was appointed May 16, 1873, to whom he assigned his real and personal property in due form. So much of the personal property as was exempt under the bankrupt law was duly set off by the assignee. Its value was estimated at $337.75. The bankrupt, however, claimed a homestead exemption in the real property under the provisions of the Constitution and laws of Virginia and the act of March 3, 1873, amendatory of the bankrupt law; and on the 20th of August, 1873, he filed his petition in the District Court of the Western District of Virginia to have such homestead set off to him. On the 30th of August, an order was made by that court granting the prayer of this petition.

Certain creditors have filed petitions for a review of this order. The cases made by the several petitioners are as follows: —

1. Henry Smith. On the 24th January, 1868, the bankrupt and J. L. Deckert executed to one Robert Wason, at Chambersburg, Pennsylvania, a note for the payment of $2,500 in one year after date, with interest. This note was afterwards assigned to Smith, who obtained a judgment upon it in the Washington County Circuit of Maryland, at the August term, 1871, for $1,441.80, that being the balance then due. At the April term, A. D. 1872, of the Circuit Court of Halifax, Virginia, another judgment was obtained by Smith against the bankrupt upon the Maryland judgment. This last judgment was duly docketed in Halifax, and became a lien upon the real estate afterwards assigned under the proceedings in bankruptcy. Smith having been cited to show cause why the prayer of the petition of the bankrupt for the assignment of the homestead should not be granted, appeared and submitted an abstract of his Virginia judgment, but he did not furnish the complete record, and did not submit the record of the Maryland judgment upon which that in Virginia was rendered. This judgment remains unpaid.

2. D. K. Wanderlink. On the 1st day of April, 1868, the bankrupt, as surety, executed a note with one J. L. Deckert, as principal, for the

payment to Wanderlink of $651.50 in six months after date. Proof of this note was made against the bankrupt's estate April 23d, 1873.

3. E. A. Roberts, John A. Roberts, and Robert R. Roberts, under the name of Roberts & Co. On the 15th November, 1869, one Gaines entered into a contract in writing with the bankrupt to construct for him (the bankrupt) a dike upon his lands. For this he was to be paid at the rate of ten cents per yard, a portion being payable as the work progressed, and the balance in ninety days after its completion. It does not appear at what time work under this contract was commenced, but it was completed on the 23d of September, 1870, when there was a balance remaining unpaid of $500.25. This was assigned by Gaines to Roberts & Co., and they proved it against the estate on the 23d of April, 1873. The cost of the whole work was 1,944.83. This had been reduced by payments so that only the above balance remained unpaid at the time of the bankruptcy.

4. George Schindel. The bankrupt was on the 1st day of April, 1870, indebted to him in the sum of $175 for rent of a house for one year from April 1, 1869. He and the bankrupt, on the 30th of June, 1868, executed their joint note to Sarah Lee for $100, payable, with interest, in six months after date thereof. Schindel paid the whole of this note. In 1872 he commenced his action against the bankrupt in the Circuit Court of Washington County, Maryland, to recover the amount due him for the rent and one half the amount paid on the note, and on the 25th of March, 1873, judgment was rendered in his favor for $270.52, and costs, $8.30. On the 22d of April, 1873, this judgment was also duly proved as a debt against the estate.

By Article XI. of the Constitution of Virginia, adopted in 1869, it was provided that every householder or head of a family should be entitled, in addition to the articles then exempt from levy or distress for rent, to hold exempt from levy and sale under execution, &c., issued on any demand for any debt theretofore or thereafter contracted, his real and personal property, &c., to the value of $2,000, to be selected by him. An act of the General Assembly of Virginia, approved June 27, 1870, gave effect to this provision by prescribing in what manner and upon what conditions such householder could set apart and hold such exemption.

Under the bankrupt law, as originally enacted, there was exempted from the assignment of property required to be made by the bankrupt to his assignee, among other things, such property as was exempt from levy and sale under execution by the laws of the State in which the bankrupt had his domicil at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864.

By an amendatory act passed on the 8th June, 1872, this provision was changed so as to give the bankrupt the benefit of exemptions under laws in force in 1871. In 1872 the Court of Appeals of Virginia unanimously decided (22 Gratt. 266) that the provision of the Constitution just referred to, and the statute giving effect to the same, so far as they applied to contracts entered into, or debts contracted before their adoption, were in violation of the Constitution of the United States, and therefore void. After this decision, on the 3d March, 1873, Congress passed another act in the following words: —

"*Be it enacted*, &c., That it was the true intent and meaning of an act approved June 8, 1872, entitled, &c., that the exemptions allowed the bankrupt by the said amendatory act should, and it is hereby enacted that they shall be the amount allowed by the Constitution and laws of each state respectively as existing in the year 1871; and that such exemptions be valid against debts contracted before the adoption and passage of such state Constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court, any decision of any such court rendered since the adoption and passage of such Constitution and laws to the contrary notwithstanding."

The first question which presents itself for our consideration is whether the act of 1873, in so far as it seeks, in the administration of the bankrupt law, to give an effect to the exemption laws of a state different from that which is given by the State itself, is constitutional.

Congress has power to "establish uniform laws on the subject of bankruptcies throughout the United States." Constitution, art. I., sec. 8. A bankrupt law, therefore, to be constitutional must be uniform. Whatever rules it prescribes for one, it must for all. It must be uniform in its operations, not only within a state, but within and among all the states. If it provides that property exempt from execution shall be exempt from assignment in one state, it must in all. If it specially sets apart for the use of the bankrupt certain property, or certain amounts of property, in one state, without regard to exemption laws, it must do the same in all. If it provides that certain kinds of property shall not be assets under the law in one place, it must make the same provision for every other place within which it is to have effect.

The power to except from the operation of the law property liable to execution under the exemption laws of the several states, as they were actually enforced, was at one time questioned upon the ground that it was a violation of the constitutional requirement of uniformity, but it has thus far been sustained, for the reason that it is made a *rule* of the law, to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. This is not unjust, as every debt is contracted with reference to the rights of the parties thereto under existing exemption laws, and no creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of creditors. One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. It is quite proper, therefore, to confine its operation to such property as other legal process could reach. A rule which operates to this effect throughout the United States is uniform within the meaning of that term, as used in the Constitution.

The act of 1873 goes further, and excepts from the operation of the assignment not only such property as was actually exempted by virtue of the exemption laws, but more. It does not provide that the exemption laws as they exist shall be operative and have effect under the bankrupt law, but that in each State the property *specified* in such laws, whether actually exempted by virtue thereof or not, shall be excepted. It in effect

declares by its own enactment, without regard to the laws of the states, that there shall be one amount or description of exemption in Virginia and another in Pennsylvania. In this we think it is unconstitutional, and therefore void. It changes existing rights between the debtor and the creditor. Such changes, to be warranted by the Constitution, must be uniform in their operation. This is not. The consequence is that the act of 1872 remains unchanged, notwithstanding its attempted amendment in 1873.

The act of 1872 gives effect to the exemption laws of Virginia as they existed in 1871. The particular law under which the bankrupt in this case claims his exemption was passed in 1870; it does not apply to contracts made or debts incurred previous to the time the new Constitution went into effect. That certainly was not before July 6, 1869, and the debts due to Smith, Wanderlink, and Schindel were all incurred previous to that date. That of Smith dates from the time the note was given upon which his judgment was rendered, that of Schindel from the making of the contract out of which the indebtedness arose, and that of Wanderlink from the time of the execution of the note which he holds. As against these creditors, the bankrupt is not entitled to the benefit of the exemption.

The claim of Roberts & Company requires us to determine at what time the Constitution, as far as it relates to the provision in question, took effect. It is claimed by the bankrupt that this was on the 6th July, 1869, when the Constitution was ratified by the people; and by the creditors, that it was postponed until the 26th of January, 1870, when the act was approved admitting the State to representation in Congress. The contract upon which Roberts & Company base their claim was made, as has been seen, on the 15th of November, 1869.

This Constitution was adopted in accordance with the provisions of the reconstruction acts of Congress. These acts provided, in substance, that when the people of the rebel States should have formed a constitution in conformity with the Constitution of the United States, and should have done certain other things named, such State should be entitled to representation in Congress. It was also further provided, that until the people of any of such States should be by law admitted to representation in Congress, any civil government which might exist therein should be deemed provisional only, and in all respects subject to the paramount authority of the United States, at any time to abolish, modify, control, or supersede the same.

In pursuance of these acts, a convention duly elected assembled in Richmond on the 3d December, 1867, and proceeded forthwith to frame a Constitution, which was certified to Congress as required by law, and thereupon an act was passed by Congress and approved on the 10th of April, 1869, authorizing its submission to a vote of the people, and an election of the state officers provided for and of members of Congress. The same act provided that if the Constitution should be ratified at such election, the legislature of the State then elected should assemble at the capital of the State on the fourth Tuesday after the promulgation of the ratification, and that before the State should be admitted to representation in Congress the legislature, that might thereafter be lawfully organized, should

ratify the fifteenth amendment proposed by Congress to the Constitution of the United States, and all the proceedings under the act should be approved by Congress.

Under the provision of these several acts the President of the United States issued his proclamation designating the 6th July, 1869, as the time for submitting the Constitution to the vote of the people. On that day the vote was taken, and resulted in an almost unanimous ratification. The state officers, members of Congress, and members of the general assembly were elected at the same time. The governor, thus elected, was inaugurated on the 21st September, 1869. The general assembly met on the 5th of October, and on the 8th passed acts ratifying the fourteenth and fifteenth amendments. It then adjourned to reassemble after Congress should approve this action of the people.

On the 26th January, 1870, Congress passed an act admitting the State to representation, and reciting that the people of Virginia *had* framed and adopted a constitution of state government which was republican.

From this it will appear that the Constitution was adopted and the government partially, at least, organized under it previous to the 15th November, 1869. It is true that the Constitution was adopted and the organization made to obtain admission to representation in Congress, but it is equally true that it was framed and ratified by the people as and for a constitution of state government. Admission might follow its adoption, but was not necessary to give it effect. On the contrary, Congress required that it should become operative and have effect before the admission could be granted.

In the act of April 10, 1869, it was provided that at the time the vote upon the ratification was taken there should be an election by the voters of members of the general assembly and all the officers of state provided for by the Constitution; that if the Constitution should be ratified, the legislature should assemble at the capital on a day named, and that, when lawfully organized, it should act upon the ratification of the proposed amendments. There certainly could be no lawful action by a legislature under the Constitution unless the Constitution was in force at the time the action was had. That Congress understood that the Constitution was in force and operative at the time of the admission is apparent from the terms of the act granting such admission. In that it was recited that the people of Virginia *had* framed and adopted a constitution of state government which was republican; that the legislature elected under the Constitution *had* ratified the fourteenth and fifteenth amendments, the performance of which acts in good faith was a condition precedent to the representation of the State in Congress, and because this *had* been done such representation was permitted.

It is true that the government was not fully organized in all its departments under the Constitution, and that the United States retained its supervisory powers under the reconstruction acts, until the final action of Congress. Complete organization of the government, however, was not necessary to give effect to the Constitution, and no modification of the particular provision now under consideration was ever attempted by the United States. The government established by the people remained as established until actually changed by the United States in the exercise of its supervisory powers.

In our opinion the Constitution of Virginia took effect, so far as it related to the provision for exemptions, on the 6th of July, 1869, — the day of its ratification by the people. It follows that the exemption laws passed to give effect to that provision are to become operative for the benefit of its citizens from that date. As against Roberts & Company, therefore, the bankrupt is entitled to his homestead.

The order of the district court allowing an assignment of the homestead as against the claims of Smith, Wanderlink, and Schindel is reversed, but it is affirmed as against that of Roberts & Company.

SUPREME COURT OF OHIO.

[TO APPEAR IN 24 OHIO STATE.]

WALSH v. *BARTON.*

MEMORANDUM OF SALE OF REAL ESTATE. — STATUTE OF FRAUDS. — DEED OF PRESIDENT OF RAILROAD AS EVIDENCE. — MORTGAGE OF RAILROAD ON "THE ROAD." — SPECIFIC PERFORMANCE. — STIPULATION TO MAINTAIN FENCE. — "POSITIVE" SALE AND BY-BIDDERS.

1. *Where the name of the agent, with whom a contract for the purchase of real estate was made, appears in the written memorandum of the agreement signed by the purchaser, who is the party to be charged, the statute of frauds is satisfied, although the names of the principals are not disclosed therein.*
2. *When a vendor of land, having contracted to convey a perfect title, brings his action to compel specific performance against the vendee, who denies the sufficiency of the vendor's title, the burden of showing title in himself rests on the plaintiff, and the introduction of a deed of recent date executed to himself, without further proof of title, is not sufficient.*
3. *A deed, purporting to have been executed by the president of a railroad corporation, under the seal of the corporation, as authorized by section* 15 *of the act of May* 1, 1852 (*S. & C.* 279), *if objected to, cannot be given in evidence without proof of its execution.*
4. *The power to purchase land, conferred upon a railroad company by section* 14 *of the act of February* 11, 1848 (*S. & C.* 273, *note*), *is not limited to the acquisition of such lands as may be necessary for operating or maintaining its road.*
5. *If, in making a purchase of real estate, the company abuse the power conferred upon it by said section, still, after resale and conveyance, the title becomes indefeasible in the hands of its vendee.*
6. *A mortgage executed by a railroad company on "the road" of the company, "whether made or to be made, acquired or to be acquired, and all property, real or personal," of the company, "whether now owned or hereafter to be acquired, used, or appropriated for the operating or maintaining the said road," is not a lien upon real estate of the company, then owned or afterward acquired, which has not been used or appropriated for operating or maintaining the road.*
7. *A purchaser of land, who is entitled under his contract to a perfect title, cannot be compelled to perform his agreement, if the property purchased be subject to a judgment lien, unless he can be protected by the decree from loss or inconvenience*

by reason of the lien, although it be shown that the judgment debtor has other property sufficient to satisfy the judgment.

8. *Where it is stipulated in a deed-poll that the grantee, his heirs and assigns, shall build and perpetually maintain a fence on the line between the land granted and other lands owned by the grantor, and the parties to such deed, at the time of its execution, contemplate the subdivision of the granted premises into building or town lots, and their subsequent sale, the burden of maintaining such fence will not attach to, or run with, lots which do not abut on the line of the proposed fence.*

9. *Where a "sale" at auction is announced to be "positive," it is an act of fraud on the part of the vendor, or his agent, to employ by-bidders to keep up the price for his own benefit.*

ERROR to the superior court of Cincinnati, in general term.

The original action was brought by the defendants in error, against the plaintiff in error, to compel the specific performance of certain contracts for the purchase of real estate. The plaintiffs had purchased from the Marietta and Cincinnati Railroad Company several parcels of land, situate near the city of Cincinnati, a part of which they subdivided into lots, and employed the firms of George H. Shotwell & Company, Hemmelgarn & Company, and Hoeffer & Buening, auctioneers, to sell the same. These auctioneers, on the 7th day of June, 1869, in accordance with public notice given in their own names, and upon the terms and conditions of sale then and there announced, offered the several lots at public auction on the premises. Four of the lots thus offered were sold separately to the defendant, who at the time signed a certificate of purchase for each lot. These certificates were of like tenor and effect. The terms of sale were: "One fourth purchase money cash; balance in one, two, and three years. Title perfect. Sale positive." The purchaser, Walsh, having refused to execute the contracts on his part, the vendors commenced their said suit on the 3d of July, 1869.

The defendant answered as follows: —

1. That the plaintiffs never tendered him a deed properly executed, and in due form, for the real estate described in their petition.

2. That whereas the plaintiffs undertook, and by advertisement promised, to sell, convey, and deliver the lands and tenements whereof they speak in their petition, with perfect title and free of all claims, they had no such title at the time of the pretended sale, nor afterward until and after the commencement of this action. And they have no such title at present.

3. That the plaintiffs employed puffers and by-bidders at their sale, whereby the defendant was deceived in his estimate of the value of the property. And the auctioneer whom they employed so fraudulently behaved as to induce this defendant to bid against himself, twice or thrice, for the real estate described in the petition.

4. That the price claimed by the plaintiffs, as described in their petition, is unreasonable and exorbitant.

To which the plaintiffs replied: —

1. That they did tender the defendant a deed properly executed, and in due form, for the real estate described in the petition.

2. They say that they had a clear title to the said real estate, and still have such title.

3. They deny that they employed puffers and by-bidders at their sale, or that any such bids were made for any of the property sold. They deny that the auctioneer employed by them fraudulently, or otherwise, induced the defendant to bid against himself.

4. They deny that the price at which said real estate was sold to the defendant is unreasonable and exorbitant.

The cause was tried to the court at special term, and the following facts were specially found: —

1. That on June 7, 1869, in pursuance of and after advertisement made, the plaintiffs caused to be exposed to sale at public auction, a number of lots of ground in a subdivision of "Ludlow Grove," as laid out and subdivided by the plaintiffs.

2. That the defendant was a bidder, with others, at said sale, and purchased the four lots of ground described in the petition herein, for the amounts and upon the terms and conditions therein stated.

3. That the sale of the lots of ground sold to and purchased by the defendant was a fair sale.

4. That the defendant, at the time of said purchase and sale, signed and executed a contract, in writing, separately for each of the lots of ground so purchased by and sold to him; which contract, so executed, recited the terms of sale, the amount to be paid as purchase money, and a description of the lot purchased.

5. That the plaintiffs on July 1, 1869, tendered to the defendant a deed of general warranty, with release of dower, and in due form of law, for the four lots of ground purchased by the defendant at said sale.

6. That the defendant refused to receive said deed when so tendered to him, refused to pay one fourth of the purchase money, and to execute and deliver to the plaintiffs his promissory notes, and secure the same with a mortgage upon the lots of ground so purchased, for the remaining three fourths of the purchase money.

7. That the plaintiffs derived their title to the said real estate from the Marietta and Cincinnati Railroad Company, as reorganized, by deed bearing date on May 22, 1869.

8. That the Marietta and Cincinnati Railroad Company, as reorganized, executed and delivered to John L. Taylor, trustee, two mortgages, which remain uncancelled of record, on the said railroad and all the property, real and personal, used or appropriated for the operating and maintaining the said road.

9. That the real estate sold to and purchased by the defendant was not used, appropriated, or necessary for the operating or maintaining the said road, and is not subject to, included in, or the title thereto incumbered by said mortgages.

10. That the plaintiffs were able, ready, and offered to comply with the terms and conditions of said sale on their part.

11. That the defendant has refused to perform his part of the said agreement in the purchase by him made.

Thereupon the court rendered judgment for the plaintiffs for specific performance.

The defendant moved for a new trial, which motion being overruled he excepted, and by bill of exceptions placed the whole of the testimony upon the record.

The judgment at special term was afterward, on petition in error, affirmed in general term.

It is now alleged for error, among other things, that the court below, at special term, erred in admitting in evidence the deed from the Marietta and Cincinnati Railroad Company to the plaintiffs below, and in its findings of facts, and in its finding of law, and in rendering the judgment entered of record.

McILVAINE, J. Several questions are presented for our consideration in this case.

I. It is claimed that the written memorandum of the contract sought to be enforced, is not sufficient to satisfy the statute of frauds in this, that it does not contain the names of the vendors.

The memorandum is as follows: —

"CINCINNATI, *June* 7, 1869.

"This is to certify that I have this day purchased, at auction, through George H. Shotwell & Co., Hemmelgarm & Co., and Hoeffer & Buening, auctioneers, a lot 167.80 feet front, and 210 feet, more or less, in depth, with improvements, at $50¼ per front foot, one-fourth cash, and the balance in one, two and three years, with interest at six per cent., secured by mortgage on the premises, being lot 'A' in Barton, Brewster, and Folz subdivision. MICHAEL WALSH."

This writing, by fair construction, shows that the auctioneers therein named, acted in and about the making of the sale as the agents of the vendors. It is certified therein by the vendee, who is the party sought to be charged, that he purchased the property described at auction *through* them. By this language we understand that the property was sold to him, by them, as auctioneers, and if so, it sufficiently appears that they were the agents of the vendors. The only question, therefore, is whether it be necessary, in order to satisfy the statute of frauds, that the names of the principals should appear in the memorandum, in a case where the contract was in fact made by their agents, and the names of the agents are set out in the writing. We think the statute is satisfied in this respect, when the names of the agents are set out in the writing, though the names of their principals be not disclosed. The case being thus taken out of the statute, the right or liability of the principals may be enforced, and their identity established, according to the rules of law governing in other cases, where contracts are made by agents without disclosing their principals. *White* v. *Proctor*, 4 Taunt. 209; *Hood* v. *Lord Barrington*, C. L. P. (Eq.) 221; *Lerned* v. *Johns*, 9 Allen, 419; *Eastern R. R. Co.* v. *Benedict*, 5 Gray, 561; *Gowen* v. *Klous*, 101 Mass. 455; *Higgins* v. *Senior*, 8 Mee. & W. 834; *Thayer* v. *Fuller et al.* 22 Ohio St. 78.

II. Did the plaintiffs below show such title in themselves as warranted the decree for specific performance?

1. The plaintiffs had contracted to convey to the defendant a good title, or, as the conditions of sale termed it, a "perfect title." The defendants denied that they were possessed of such a title; and the only evidence offered to show title in themselves, was a deed from the Marietta and Cincinnati Railroad Company to them, dated May 22, 1869, less than a month prior to the sale, together with oral testimony, tending to prove

that the railroad company had been in possession before the date of the deed. The nature of this possession, or the length of time during which it was held was not shown.

Captious objections to the title ought not to prevail, when made by a purchaser who seeks to avoid the performance of his contract; but in a case of specific performance, when the title of the vendor is denied, a decree should not be rendered against him, unless it be made to appear, with reasonable certainty, that the title is good; and the burden of making it so appear rests upon the vendor. Having contracted to convey a good title, and the evidences of his title being matters peculiarly within his own knowledge, the vendor must aver and prove that he is able, as well as willing, to perform the contract on his part. We do not say that the vendor, in such case should be called upon in the first instance to show, beyond all doubt, that his title is perfect; but he should satisfy the chancellor that his title is such as would satisfy men of ordinary prudence. We think, therefore, that the court below was not warranted in finding, from the testimony, that the plaintiffs were *able* to comply with the conditions of the contract on their part.

2. Did the court err in permitting, against the objections of the defendant, the deed from the M. & C. R. R. Co. to the plaintiffs, to be given in evidence without proof of its execution?

This deed purports to have been signed by John King, Jr., president of the corporation, and under the seal of the corporation, as authorized by section 15 of the act of May 1, 1852 (S. & C. 279); and its execution purports to have been attested by two witnesses.

The signature of the president of the corporation to such a deed does not prove itself, nor is it proven by the seal of the corporation. It was error, therefore, to admit the deed without proof of its execution by the president of the company.

It is suggested by defendants in error that, in fact, the record of the deed, from the office of the recorder of Hamilton County, was the instrument offered, and not the original deed: and that the record was admissible without proof of the execution of the instrument recorded.

To this suggestion it is sufficient to say, that the bill of exceptions shows that the deed itself was the objectionable instrument admitted, and we are not at liberty to question the verity of the record,

3. Waiving the error in admitting in evidence the deed from the railroad company to the plaintiffs below, it is claimed by the plaintiff in error that the title of the plaintiff below is at least doubtful, because the railroad corporation had no power to acquire or transfer the title to the premises in question.

We agree with counsel, that a corporation has power to acquire real estate only when such power is granted to it by statute or by its charter. Power to acquire and convey real estate, however, was granted to this railroad company by section 14 of the act of February 11, 1848 (S. & C. 273, note), as follows, to wit: —

"Such company may acquire, by *purchase* or gift, any land *in the vicinity of said road*, OR through which the same may pass, so far as may be deemed *convenient* OR necessary by said company *to secure the right of way* or such as may be granted to aid in the construction of said road, or

be given by way of subscription to the capital stock ; and the same to hold *or convey* in such manner as the directors may prescribe."

See also section 15 of act of May 1, 1852, S. & C. 279.

The only testimony in this case tending to show the purpose for which the company acquired these lands, is to the effect that they were purchased to secure a right of way for its road through the same. If such purchase, in the exercise of good faith, was, by the company, deemed convenient or necessary to secure the right of way for the road, it is clear that the power granted by the statute was ample for the purpose. If, however, it were shown that the company abused its discretion and power in making the purchase — that, in fact, the purchase of the whole of these lands was not convenient or necessary to secure the right of way for its road — still we think, that the lands having been purchased by the company for a valuable consideration, and having afterwards been conveyed to the plaintiffs, the title became indefeasible in them. In no event, under the laws of this State, would the property escheat; and the vendor of the company, and the company itself, having executed the conveyances and delivered possession, would be estopped from questioning the validity of the plaintiffs' title. Whatever consequences might result to the corporation, if the State were to inquire into the abuses of its charter, it is quite certain that the title to these premises in the possession of the plaintiffs below or their assigns, would not be affected by such inquiry. 3 Rand. 186 ; 7 S. & R. 313 ; 11 S. & R. 411 ; 7 Penn. St. 233 ; 4 Johns. Ch. 370 ; 4 Sandf. Ch. 758 ; 9 Humph. 306 ; *Land* v. *Hoffman et al.* 12 Am. L. Reg. 143, Sup. Ct. of Missouri.

III. It is also claimed that the plaintiffs below were not entitled to the decree for specific performance, because the title tendered to the defendant was subject to certain incumbrances.

1. Previous to the conveyance of these lands by the railroad company to the plaintiffs, and in fact before the railroad was constructed through them, the company had executed two mortgages to one Taylor, as trustee, to secure the holders of the company's bonds, upon the following described property, to wit: —

"The road of the said party of the first part from Marietta and Belpre to Cincinnati and Dayton, and Hillsboro, whether made or to be made, acquired or to be acquired, and all property, real and personal, of said party of the first part, whether now owned or hereafter to be acquired, used or appropriated for the operating or maintaining the said road extending from Marietta and Belpre, as aforesaid, and all the privileges and franchises of said party of the first part for the holding, operating, and maintaining the same, together with the income thereof."

At the time of trial below, these mortgages were unsatisfied. The testimony shows that the railroad was not located on the lands embraced in the purchase of the defendant below, nor were the lots purchased by him ever used or appropriated for railroad purposes. The question, then, is this: Was the entire tract of land embraced in the mortgages? We think not. The words "used or appropriated for the operating or maintaining the said road," restrict the operation of the granting words contained in the mortgages to such property, personal or real, of the company, as then was or thereafter might be used or appropriated for operating or

maintaining the road. Any property which the company then owned, or afterward acquired, which has in fact been used or appropriated for operating and maintaining the road, and none other, is subject to these mortgage liens. The defendant's purchase, therefore, was not incumbered by these mortgages.

2. In May, 1869, one William M. Picksley recovered a judgment in the superior court of Cincinnati, against the Marietta and Cincinnati Railroad Company, for $5,000 and costs. This judgment was a lien upon the lands sold to the defendant below, and was in full force at the time of decree for specific performance. No provision was made in the decree for the protection of the purchaser against this lien, by application of the purchase money or otherwise.

The defendants in error do not contend that the plaintiff in error should have been compelled to perform his contract and take the risk of having his property afterward subjected to the payment of this judgment; but they claim: 1. That this judgment has been superseded, and is now under review on proceedings in error in this court; and 2. That the judgment debtor is possessed of ample property, which must be exhausted before the property in controversy can be subjected to the payment of the judgment.

These arguments may be answered in several ways: 1. The facts upon which they are based do not appear in this record; 2. If the facts be admitted, still the lien of the judgment is preserved notwithstanding a supersedeas bond may have been given, and if the judgment be affirmed, it is not at all clear that equity would compel the judgment creditor to first exhaust the property remaining in the railroad company before he could have satisfaction out of the property in question; and 3. At all events the purchaser should not be required to assume either the risk or expense of prosecuting an action to compel the judgment creditor to seek satisfaction out of other property of the judgment debtor.

We think the liability of the lots in question to be taken for the satisfaction of this judgment is quite too imminent to justify a decree for specific performance against the purchaser, without at least protecting him against such hazard, by an application of the purchase money to the discharge of the judgment.

3. The lots of land in controversy are parts of a certain tract or tracts conveyed by the Marietta and Cincinnati Railroad Company to the defendants in error on the 22d of May, 1869. The line of the grantor's railroad was located upon the lands thus conveyed. The conveyance was by deed-poll, which contained the following stipulations, viz.: —

"But said tracts, and each of them, are subject to the obligation hereby imposed upon the grantees to discharge, and save harmless, the grantor herein from the duty of building or maintaining any fence on either side of its track through or between said lands; and said grantees, in accepting this deed, assume said duty and obligation, and bind themselves, their heirs and assigns, to build and perpetually maintain, along the lines of the railroad of the grantor, on each side thereof (except where the same may be intersected or crossed by streets, alleys, or public ways), so far as said railroad runs through or between either of said parcels of land, or is contiguous thereto, a good and substantial fence."

It is claimed by plaintiff in error, that these stipulations constitute a

covenant on the part of the grantees to build and perpetually maintain the fences named; that this covenant runs with the land, so that the defendants in error were unable to convey the lots by him purchased, with title perfect and unincumbered, as they had contracted to do.

If it be conceded that it was competent for the parties to that conveyance to impose upon the lands conveyed a servitude or burden for the benefit of lands retained by the company for the use of its road; and if it be further conceded that such burden, if the parties so intended, would attach to every part of the *servient* estate and follow it into whosesoever hands the same or any part of it might come, then it is necessary to inquire, in the light of the surrounding circumstances, whether such was the intent of the parties in this case.

We think it quite certain that the parties to this deed contemplated, at the time it was made, that the land would be disposed of in subdivisions or building-lots. It was in fact sold in lots, at public auction, within sixteen days from the date of the deed. The plat of the subdivision was made and advertised before the auction. In the deed itself, fences are excepted where the lines of the railroad might be intersected or crossed by *streets*, *alleys*, or public ways. If such subdivision and sale of the premises, in lots, were contemplated by the parties, it is unreasonable to hold that any lot was intended to be burdened with the maintenance of fences against which it does not abut.

The lots purchased by the plaintiff in error are not contiguous to the lines of the railroad, but are situated at considerable distance therefrom. Several other lots intervene between them and the line of the road. And whatever may be the burden (if any) which rests upon lots abutting on the line of the railroad, as to maintaining fences thereon, we think the plaintiff in error has no reasonable grounds to apprehend any loss or inconvenience from the supposed incumbrance of maintaining fences, as provided for in this deed.

IV. It is also claimed by plaintiff in error, that he was entitled to avoid the sale on the ground of fraud, in this, that notwithstanding the property was offered at auction, on the condition that the sale should be without reserve, yet the vendors secretly employed bidders for their own benefit.

"Sale positive" was one of the conditions of the auction, and we agree with counsel for the plaintiff in error, that these words are equivalent to "sale without reserve:" and we also agree with them, that when a sale at auction is announced to be without reserve, it is a fraud on the part of the vendor to employ a bidder to keep up the price on his behalf, and that such fraud is a bar to an action for specific performance. At such sale, it is the right of the highest bidder to have the property knocked down to him, under any and all circumstances, without reference to the amount to which the bidding may go. Upon examination of the testimony, however, we are not satisfied that such fraud was committed at this sale, by the vendors or their agents. It is true that one of the auctioneers procured a person (who did not intend to take the property at his own bid) to bid at the sale; but we are not satisfied that such employment was not authorized by another person for whom the bid was intended, and who was ready and willing to take the property at the bids thus procured, if they had proven to be the highest bids. It is also true that one John

Ryan, who had some interest in the sale, jointly with the defendants in error, bid in good faith, and purchased some of the lots on his own account. This, however, was not bidding in violation of the conditions of sale, as it could, in no event, have prevented a sale to the highest bidder.

From this view of the case, it follows that the judgments below must be reversed for error, in admitting in evidence the deed from the railroad company to the plaintiffs below, without proof of its due execution; in finding that the title of defendants was such as they had contracted to convey, and in decreeing specific performance without protecting the purchaser against the lien of the judgment in favor of Picksley.

Judgments reversed, and cause remanded for further proceedings.

DAY, C. J., WELCH, STONE, and WHITE, JJ., concurred.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1873.]

PRACTICE OF SUPREME COURT U. S. — WHEN WRIT OF ERROR OPERATES AS A SUPERSEDEAS.

COMMISSIONERS OF BOISE CO. v. *GORMAN.*

A writ of error does not operate as a supersedeas until the filing of the bond. But under the act of 1872 *the bond may be filed and a supersedeas obtained any time within sixty days after judgment. Such supersedeas will have the effect of preventing further proceedings under an execution, but will not affect whatever may have been done prior to its being issued.*

Mr. Chief Justice WAITE delivered the opinion of the court.

The plaintiffs in error ask that a writ may issue from this court commanding the restoration of Ben. T. Davis to the office of assessor and tax collector of Boise County, for the reason, as is alleged, that he has been ousted from that office by virtue of a writ issued upon the judgment in the court below, after the allowance of a writ of error to this court, which operated as a supersedeas.

In order that a writ of error may operate as a supersedeas, it is necessary that a copy of the writ should be lodged for the adverse party in the clerk's office where the record remains, and that the bond approved by the judge allowing the writ should also be filed there. *O'Dowd* v. *Russell*, 14 Wall. 402. Execution cannot issue upon the judgment until the expiration of ten days, exclusive of Sundays, from the entry thereof. If the writ of error and bond are filed before the expiration of the ten days, no execution can issue so long as the case in error remains undisposed of. After the expiration of the ten days an execution may issue. Notwithstanding this, under the provisions of the act of 1872 (17 Stat. at Large, 198, sec. 11), upon the filing of the bond within sixty days from the time of the entry of the judgment a supersedeas may be obtained. Such a supersedeas, however, stays proceedings only from the filing of the bond. It prevents further proceeding under an execution which has been issued, but does not interfere with what has already been done.

In this case the record shows that the judgment was actually entered on the 20th day of January. The entry as made was read in court on the morning of the 21st and the record signed by the judges, but it was ordered to be made on the 20th. The ten days, exclusive of Sundays, prescribed by the act of Congress for delay of execution, expired on Saturday, the 31st of January. On Monday, the 2d of February, a majority of the judges of the court directed the clerk to issue a writ of restitution to carry the judgment into effect. On the same day the chief justice of the court allowed a writ of error and signed the necessary citation. A copy of the writ of error was filed in the clerk's office and the writ and citation actually served upon the defendant in error before the clerk had completed the preparation of the writ of restitution. After he had completed its preparation he handed it to the attorney for the defendant in error, who had previously been served with the citation. No supersedeas bond was filed with the clerk on the 2d, and no notice was given that any had been approved. On the morning of the 3d of February the writ of restitution was served and Davis removed from his office. After this, and on the same day, a bond approved by the chief justice was left in the clerk's office by him. It nowhere appears from the record when this bond was approved. It bears date the 2d of February, but there is no certificate of the time when the approval was entered. It is certain, however, that it was not filed in the clerk's office until after service of the writ of restitution. The writ of error operated as a supersedeas only from such filing. That was too late to prevent the removal of Davis from his office in pursuance of the authority of the judgment; and we cannot now order him to be restored.

It is claimed, however, that as the record of the judgment was not signed by the judges of the court until the 21st, the ten days did not commence to run until that date, and we are referred to the case of *Silsby* v. *Foote*, 20 How. 290, as establishing such a rule. In that case the decision was actually rendered on the 28th of August, but the decree was special in its terms, and was not settled or signed by the judge until the 11th December. Before any entry could be made it was necessary that the judge should pass upon its form. It was, therefore, quite right to delay the appeal until the exact character of the decree could be known.

Here, however, the form of the judgment was settled upon the announcement of the decision, and it was entered accordingly.

But the writ of restitution was not served until after the expiration of ten days from the 21st, and it does not appear that it was actually delivered to the sheriff for service before that time. There is nothing to prevent the preparation by the clerk of an execution before the expiration of the ten days. It cannot be issued before, and it is not issued until it is placed beyond the control of the clerk himself. So long as it remains with him, or under his control, it is like any other paper in his office.

We think the motion must be denied, and in accordance with the request of the parties made at the argument, the case is dismissed.

CIRCUIT COURT OF THE UNITED STATES. — EASTERN DISTRICT OF VIRGINIA.

[JUNE, 1874.]

WAIVER OF HOMESTEAD EXEMPTION. — BANKRUPTCY.

IN RE SOLOMON.

A statute which permits the head of a family to waive an exemption of homestead is not an infraction of a constitutional provision by which such exemption is created.

Where a party waived his right of homestead exemption in a negotiable promissory note, and was subsequently adjudged a bankrupt, it was held that the homestead was not exempt as against the holder of the note.

John Dunlop, Esq., for the creditors, appellants.

A. R. Courtney, Esq., *contra.*

The facts appear in the opinion.

The opinion of the court was delivered by

WAITE, C. J. On the 31st January, 1873, the bankrupt executed to Glazebrook & Thomas, at Richmond, Virginia, his note for the payment to them, or their order, of the sum of $234.50 at sixty days after date. It contained the following clause: "I hereby waive the benefit of the homestead exemption as to this debt."

Glazebrook & Thomas indorsed this note to Gibson & Crilly.

Solomon was adjudged a bankrupt, on his own petition, upon the 1st of May, 1873. Gibson & Crilly made proof of their claim against the estate on the 24th May. An assignee was appointed, who on the 16th of February, 1874, set off to the bankrupt his homestead exemption under the laws of Virginia, without regard to the waiver expressed in the note of Gibson & Crilly. They thereupon filed their petition in the district court, the object of which was to set aside this action of the assignee, so far as it operated to prevent their subjecting the property set off to the payment of their debt in case the remainder of the bankrupt's estate should prove insufficient for that purpose. Their claim for this relief is predicated entirely upon the waiver of the exemption which is contained in their note. We are therefore called upon to consider the effect of this waiver.

By section 1, article XI. of the Constitution of Virginia it is provided that every householder or head of a family shall be entitled to hold exempt from levy, &c., property to the value of not exceeding $2,000, to be selected by him; by section 3, it is further provided that nothing in the article should be construed to interfere with the sale of property exempted, or any portion thereof, by virtue of any mortgage, deed of trust, pledge, or other security thereon; and by section 5, that the General Assembly should, at its first session under the Constitution, prescribe in what manner on what conditions the said householder or head of a family should thereafter set apart and hold for himself and family a homestead out of

the property thereby exempted, and might, in its discretion, determine in what manner and on what conditions he might thereafter hold for the benefit of himself and family such personal property as he might have, and coming within the exemption thereby made, but that said section should not be construed as authorizing the General Assembly to defeat or impair the benefits intended to be conferred by the provisions of this article. By section 7 it was provided that the provisions of the article should be construed liberally, to the end that all the interests thereof might be fully and properly carried out.

In June, 1870, the General Assembly passed an act such as was required by section 5, and in its third section provided that in all cases where a debtor or contractor shall declare in the body of the bond, note, or other evidence of the debt or contract that he waives as to such debt or contract, the exemption from liability of the property which he may be entitled to hold under the provisions of said act, the property, whether previously set apart or not, should then be liable to be subjected for such debt or contract under legal process in like manner and to the same extent as other estate of the said debtor or contractor; provided, that when such debtor or contractor is possessed of other estate than that which he may be entitled to hold exempt in the county in which suit is brought against him, or the property set apart under the provisions of this act may be, then such other estate shall be subjected and exhausted before that which is exempt could be sold. The words employed in the note held by Gibson & Crilly are declared by the act to be sufficient to operate as such waiver.

If this provision of the act is constitutional, the waiver can be enforced.

Every statute is presumed to be constitutional. It cannot be declared by the courts to be otherwise, unless it is made clearly so to appear. If the case is doubtful, the express will of the Legislature should be sustained.

Keeping these familiar principles in mind, we proceed to consider the constitutionality of the act in question.

The Constitution grants the exemption as a privilege to the householder. It declares that he shall be *entitled* to hold property to be *selected* by him. No specific property is set apart, but he can select such as he desires to have, and when selected it is to be set apart. If he fails to select, the process of the law can be executed, and the sale made. The right of selection must be exercised before the sale. If the householder fails in this, his right of exemption in the property sold is gone.

The privilege, so far as it is given by the Constitution, is personal to the householder. The language is, "to be selected *by him.*" If he neglects to act, no one is authorized by the Constitution to act in his place. The case is entirely different from what it would have been if it had been declared that certain specific property should not be sold under execution, &c. In that case, the Constitution, or a law containing similar provisions, would execute itself; and as it would be a part of the public policy of the government to exempt that particular property absolutely from forced sale, its provisions could not be waived. It would be beyond the legal power of an officer to levy upon and sell such property.

Here, however, the policy is not to exempt absolutely, but the householder has a right to claim an exemption. Whether he will make his

claim or not is optional with him. If he does not claim, he cannot have; and it is difficult to see why, if he may waive at the time of the sale by refusing to select, he may not before. If he can waive at all, it seems to us it follows necessarily that for a good consideration he may make a contract to waive such as the courts will enforce.

But it is further provided that nothing in the article of the constitution referred to should be construed to interfere with the sale of the property or any portion of it by virtue of any mortgage, deed of trust, pledge, or other security thereon. Thus it is made expressly to appear that it was not the intention of the framers of the constitution to prevent the householder from contracting for the sale or incumbrance of the property. He was not required to hold it absolutely for himself and family. It was to remain entirely under his personal control, to be dealt with in such manner as he saw fit. His right to sell and incumber is as distinctly given as his right to select. If he sells or incumbers before he selects, his power of selection, as against such sale or incumbrance, is gone. No particular form of incumbrance is specified; that is left to the discretion of the legislature. Now a waiver of the right to select is, in effect, an incumbrance on the property which might be selected. True, in the absence of a statutory provision to that effect, one cannot ordinarily mortgage or otherwise incumber his future-to-be-acquired property, but it is no doubt within the power of the legislature to authorize him to do so. If it does, his incumbrance upon such property is binding, the same as upon any other.

The Legislature of Virginia has in this case attempted in effect to authorize a householder to incumber in a particular manner his preëmption interest in his property, as well that which he has acquired as that which he may acquire. It seems to us that in so doing it has not in any manner impaired the benefits which it was the object of the constitution to confer. The object was to give the householder full power and control over his property; to permit him to use it in such manner as in his judgment would best promote the interest of himself and his family; and if he had not by some voluntary act of his own deprived himself of the right, to allow him to select and hold a certain specified *amount*, not *description*, of property free from the process of the law to enforce the payment of his debts. The amount thus exempted was large, in many instances no doubt more than the value of all the property the debtor owned. Unless he could in some form make this property available for the purposes of security, he and his family might not unfrequently be reduced to want. A mortgage, or pledge, or deed of trust, might not always furnish the security required. Take the facts of this very case as an example. The bankrupt appears to have been a merchant, and purchased his goods on credit. One of the classes of property which he wishes set off to him consists of his stock of goods remaining on hand. So far as appears from the papers submitted to us, his whole unincumbered property will not be sufficient to give him the full amount which the constitution would permit him to hold. The note of these creditors was given for goods purchased on credit to keep up his stock. Unless, therefore, he could in some manner give security upon his exempted property, it is fair to presume he could not have obtained his credit. A mortgage upon property held for

sale would be precarious security, if valid at all as against creditors, and a pledge would be inconsistent with the retention of the possession by the owner for the purpose of sale. The only real security that could be given in such a case would be by a waiver of the right of exemption in favor of that particular debt. This the legislature has authorized the debtor to make, and we think in so doing it acted within the scope of its constitutional powers. Whether such a waiver could be enforced without legislative authority for making it, we are not called upon now to consider. It is sufficient for this case that this authority has been given.

The judgment of the district court, that the provisions of the act allowing a waiver of the exemption are unconstitutional, is reversed, and the court is directed to proceed to hear and determine the cause upon the other issues made by the pleadings.

CIRCUIT COURT OF THE UNITED STATES.—DISTRICT OF CALIFORNIA.

[June, 1874.]

PROPERTY IN MEMBERSHIP OF BOARD OF STOCK BROKERS.

HYDE v. *WOODS.*

Where under the articles of association of a Board of Stock Brokers, a member cannot transfer his seat to a party not elected and approved by the board; and where, upon the insolvency of a member, his rights as such are forfeited, and the board is authorized to dispose of his seat, and apply the proceeds to the payment of his indebtedness to other members of the board to the exclusion of all others, only the residue of the proceeds of the sale after paying all the liabilities provided for in said articles of association, is assets of such insolvent member.

Under such articles, F., a member, failed to meet his engagements in the board, August 24, 1872, *and being indebted in a large amount to sundry members, on that day assigned his seat in the board to W., with authority to sell and pay the proceeds to his various creditors in the board. With the assent of the board, W. sold the seat to T., who was elected by the board, for ten thousand dollars, and, with the approval of the board, paid the entire proceeds pro-ratably to F.'s creditors, who were co-members. October 1st,* 1872, *F. was adjudged a bankrupt on petition of a general creditor filed September 18th,* 1872. *After said sale and payment, an assignee having been appointed, he brought suit against W. to recover said sum of ten thousand dollars. Held, That the assignee was only entitled to the residue after payment of F.'s liabilities to the co-members provided for in the articles of association, and there being no surplus, he was not entitled to recover.*

THE facts are set forth in the opinion.

SAWYER, C. J. This is an action by the assignee in bankruptcy of Thomas W. Fenn, to recover the proceeds of the sale of the seat of Fenn in the "San Francisco Stock and Exchange Board," which were received by defendants within four months before the filing of the petition in bankruptcy. The petition in bankruptcy against Fenn was filed by a creditor

September 20, 1872, and he was adjudged a bankrupt thereon October 1, 1872. The facts are as follows: —

In 1862 "The San Francisco Stock and Exchange Board" was organized, and a constitution and by-laws adopted for the government of all who should become members. Under said constitution and by-laws, the number of members was limited, and no person could be admitted except upon an election by ballot upon a proposal, made at least five days preceding the election, and five negative votes excluded the applicant. Every party so elected subscribed to the constitution and by-laws, and agreed to be bound by their provisions. There was at no time any ownership or property in the privilege of membership in said board, or right to do business therein as a member, except as provided in, and limited by, said articles, constitution and by-laws; and the privileges granted to any one becoming a member were not assignable, descendible, or transferable, except as provided in said constitution and by-laws.

Article IX. of said constitution provided as follows: —

"Any member who fails or has failed to comply with his contracts, or becomes insolvent, shall be suspended until he has settled with his creditors. That on his application for re-admission, a committee of three members shall be appointed by the president to investigate his conduct and the cause of his failure. The applicant shall then be admitted to his seat in the board, upon the assent of two thirds of the members there present." Article XIV. provided as follows, to wit:

"In case of retirement of any member in good standing from this Board, he shall have the right to sell his seat to the best advantage and to nominate his assignee to fill the vacancy. Provided, that said nominee shall thereby acquire no right or privilege, until proposed and elected in the manner and form prescribed by the constitution of this board, it being distinctly understood that this board reserves to itself the right to reject any, or all nominees at its pleasure. Any member assigning his seat, shall be entitled to the initiation fee at the time, in case his nominee shall be elected by the board. In case of the death of a member, this board pledges itself to dispose of the vacant seat to the best advantage, for the benefit of the widow and children of the deceased; and in case there be neither widow nor children, then for the benefit of such parties as the deceased may indicate in his last will and testament. In case of the suspension of any member by failure to fulfil his contracts, or by insolvency, the board will exercise a generous discretion, guided by the circumstances of each case, in disposing of the seat for the benefit of the party suspended. Provided, that a party who accepts the proceeds of the sale of his seat under this restriction shall not be re-admitted except in the manner and form prescribed by the constitution and by-laws, for the admission of new members. All members of this board who may have been suspended for six months and upwards, and who have not made a satisfactory settlement of their contracts during that time, shall be deprived of all privileges of membership of this board; and their seats become the property of their creditors in the board."

Article XV. provided as follows: —

"In sales of seats for account of delinquent members, the proceeds shall be applied to the benefit of the members of the board, exclusive of outside

creditors, unless there shall be a balance after payment of the claims of members in full."

Thomas W. Fenn became a member of said board, October 21, 1871, subject to said articles, and thereby his privilege of doing business therein and his seat became security to said board, and the members thereof, for his obligations and indebtedness incurred in said board to the members thereof. On the 24th of August, 1872, he became delinquent in said board by failure to fulfil his contracts therein made with divers members thereof. On the same day, and for the purpose of securing to his said creditors in said board all benefit and advantage, which the security of said seat afforded them under said constitution and by-laws, and his agreement theretofore made on October 21, 1871, he, on said day, executed and delivered to the defendants a certain instrument in writing, in the words and figures following: —

"SAN FRANCISCO, *August* 24, 1872.

"I hereby assign my seat in the San Francisco Stock and Exchange Board, to Messrs. Woods & Freeborn, and hereby authorize them to sell the same to the best advantage, and apply the proceeds of sale to the payment of all debts due from me to the members of said Board.

"T. W. FENN."

Witness, J. W. FREEBORN.

Thereafter, one W. B. Thornburgh applied for admission to said San Francisco Stock and Exchange Board, and was duly elected thereto as a member, and the defendants then and there, to wit, on the sixteenth of September, 1873, by permission of said San Francisco Stock and Exchange Board, transferred the said membership or seat to said Thornburgh, and received from him therefor the sum of ten thousand dollars, gold coin of the United States.

At the time of the execution of said instrument, the admission of said Thornburgh and receipt of said money, said Fenn was insolvent, and said defendants then had reasonable cause to believe him to be insolvent, and at said times the said defendants were members of said Stock Board, and said Fenn, as a member of said board, was indebted to said defendants, as such members, upon transactions had in said board, within the intent and meaning of said provisions of the constitution and by-laws hereinbefore set out, for which the seat and privileges of said Fenn as such member were security, in the sum of more than $2,978.30, and said Fenn was at said time in like manner, indebted to divers other members of said Board, arising upon like transactions, and for which his said seat and privileges were in like manner security, in amounts exceeding the sum of ten thousand dollars in gold coin.

Upon the receipt of said sum of ten thousand dollars, as aforesaid, and prior to the commencement of the proceedings in bankruptcy, set forth in the complaint herein, the defendants applied to the payment, and paid over to the several creditors of said Fenn in, and as members of, said Stock Board, upon the said several amounts of indebtedness, the whole of said sum of ten thousand dollars so received, dividing the same pro-ratably between said several creditors, the sum received and retained by said defendants,

and applied to the satisfaction of a portion of the said indebtedness to themselves, being upon said pro-rata division the sum of $2,973.30, and no more, the remainder of said sum of $10,000 having been paid on the said claims of said other creditors in said Stock and Exchange Board.

At the time of the commencement of said proceedings in bankruptcy, the said funds had all been paid over and applied as aforesaid. There were not at that time any funds of said Fenn in the hands of said defendants, nor had there been any funds of his in their hands at any time other than as aforesaid.

The San Francisco Stock and Exchange Board is a voluntary association. The members had a right to associate themselves upon such terms as they thought fit to prescribe, so long as there was nothing immoral, or contrary to public policy, or in contravention of the law of the land, in the terms and conditions adopted. No man was under any obligation to become a member, unless he saw fit to do so, and when he did, and subscribed the constitution and by-laws, thereby accepting and assenting to the conditions prescribed, he acquired just such rights with such limitations, and no others, as the articles of association provided for. I find nothing in the articles, constitution and by-laws of this association in contravention of the law of the land. The rights acquired by a party entering the association with the assent of the other members, are clearly prescribed in these articles. Under their provisions there is in a member no absolute unlimited right of disposition of his seat or the privileges of membership. Each member holds his seat and exercises the privileges conferred subject to certain prescribed rights of the association, and of the other members in his seat, in case he fails to perform his duty towards the association, or to his fellow-members. And the rights accorded to the association or his fellow-members by the terms upon which a member is admitted, cannot be abrogated or limited by any subsequent act of his. A member cannot dispose of his right of membership to another, unless the association shall accept that other in his stead, in the mode and upon the terms prescribed. If he fails to meet his liabilities to his fellow-members, incurred in the course of the proper business transactions of the board, he is suspended, and if his obligations are not met, and he is not restored within the time prescribed, his rights and privileges as a member become the property of the association, and are disposed of for the benefit of his creditors in the board to the exclusion of all others. He cannot, himself, by any act or disposition of his own, prevent this result. His general creditors can obtain through him no greater rights of property than he himself possesses. His privileges as a member of the Stock Board could not be seized and sold on execution, and transferred to another in violation of the rights secured by the contract of association, nor could a court of bankruptcy override the rights of the association or its members, secured to them by the terms of the contract under which he acquires any rights at all as a member by disposing of a greater interest than he himself possesses. The only property of a pecuniary nature in Fenn after his default in the board, would be the residue left after disposing of his seat by the board, in accordance with its prescribed usages, or with the assent of the board, and payment of his indebtedness to the members of the board, incurred in the transaction of its business. This is all, that, under any circumstances, would be available

to the general creditor, or with which the court of bankruptcy has any concern. The rest is the property of the board and its members, not Fenn's. In this case there was a delinquency of Fenn in his transactions in the board. He was indebted in large sums to the members upon transactions occurring in the board, for which his seat and privileges, as a member, were first liable under the rules of the association. It is true that he did not insist upon waiting six months under the rules, as he might have done, before his seat became absolutely forfeited. He merely waived this right, and allowed his seat to be disposed of at once, and applied to the purposes provided for in the articles of association. His assignment to defendants only enabled them to close up without delay his connection with the board, and distribute the avails to the proper parties instead of waiting six months. There is no claim set up that the privileges of Fenn did not sell for all they were worth ; and the money realized did not satisfy the just claims of the other members. Nor is there any claim that this proceeding was in fact more disadvantageous to creditors, than if the proceedings had taken a different course. There was nothing left which, under any circumstances, could be available to the general creditors. Fenn transferred nothing to defendants that a court of bankruptcy could take hold of.

There was no residuum. His estate being subordinate to the claims of his associates, under the articles of association, and consisting only of such residuum, there was nothing of it of value. Defendants only received and distributed to the proper parties that part of the proceeds of Fenn's seat, which belonged to the other members, as they had a right to do under the articles of association.

The error of the plaintiff consists in regarding the seat of Fenn and its proceeds as wholly his property, subject to his absolute disposition, whereas he only had a qualified and limited property in it — an interest subordinate to that of his associates. His estate is what is left after other paramount claims are satisfied out of it, and there appears to be nothing left. The prior rights of his co-members accrued by virtue of the very act by which Fenn acquired any rights at all, as a member of the board, and they cannot be divested. The articles of association do not authorize Fenn, or anybody else, to dispose of *Fenn's* property contrary to the provisions of the Bankrupt Act, as claimed by the plaintiff. They only determine what the extent of his rights of property under the articles of association are, and authorize the board to administer its own affairs, and protect the rights of its own members in matters pertaining to the transactions of the board, in its own way.

There must be judgment for the defendants with costs.

CIRCUIT COURT OF THE UNITED STATES. — EASTERN DISTRICT OF NORTH CAROLINA.

[JUNE, 1874.]

JURISDICTION OF UNITED STATES COURTS IN RESPECT OF STATE PROPERTY. — STATE PROPERTY IN HANDS OF TRUSTEE.

SWASEY v. *NORTH CAROLINA RAILROAD CO. et al.*

The courts of the United States may take jurisdiction of causes affecting the property of a State in the hands of its agents without making the State a party when the property or agent is within the jurisdiction.

The company in this case holds the share of its property represented by the stock subscribed by the State, in trust, as well for the bondholders as for the State. The charter made the company the depository of the pledge to hold it for both parties. Consequently a suit which seeks to charge the stock as security, and brings the corporation in to represent it, may be maintained, in the absence of the State as a party.

It appearing to the court that the stock had been deposited with the company to secure the payment of interest in which default had been made, a sale of the stock was directed to be made unless the State should provide by taxation for the amount due within a reasonable time.

THE opinion states the facts.

The opinion of the court was delivered by

WAITE, C. J. The North Carolina Railroad Company was incorporated by an act of the General Assembly, passed January 27, 1849, to construct a railroad to commence at the Wilmington & Raleigh Railroad, and proceed to Charlotte. To aid in building the road, the Board of Improvement was, by the act of incorporation, authorized to subscribe, on behalf of the State, $2,000,000 to the capital stock of the company.

Sections 38 and 41 of the act are as follows: —

"SEC. 38. That in case it shall become necessary to borrow the money, by this act authorized, the public treasurer shall issue the necessary certificates, signed by himself and countersigned by the comptroller, in sums not less than one thousand dollars each, and pledging the State for the payment of the sum therein mentioned, with interest thereon at the rate of interest, not exceeding six per cent. per annum, payable semi-annually at such times and places as the treasurer may appoint; the principal of which certificates shall be redeemable at the end of 30 years from the time the same are issued, but no greater amount of such certificates shall be issued at any one time than may be sufficient to meet the instalment required to be paid at that time."

"SEC. 41. That as security for the redemption of said certificates of debt, the public faith of the State of North Carolina is hereby pledged to the holders thereof, and in addition thereto, all the stock held by the State in the N. C. R. R. Co. hereby created, shall be and the same is hereby pledged for that purpose, and any dividends of profits which may from time to time be declared on the stock so held by the State as aforesaid,

shall be applied to the payment of interest accruing on said certificates; but until such dividend of profit may be declared, it shall be the duty of the treasurer, and he is hereby authorized and directed to pay all such interest, as the same may accrue out of any moneys in the treasury not otherwise appropriated."

The authorized subscription was made and certificates of debt issued to the amount of $1,858,000, on which the money was borrowed to meet the payments. By these certificates it was "certified that the State of North Carolina justly owes , or bearer, $1,000, redeemable in good and lawful money of the United States, at, &c., on the 1st day of July, 1884, with interest thereon at the rate of 6 per cent. per annum, payable half yearly at, &c., on, &c., until the principal be paid, on surrendering the proper coupon hereto annexed." On the 14th of February, 1855, the General Assembly passed another act, entitled "an act for the completion of the North Carolina Railroad," by the terms of which the public treasurer was authorized and instructed to subscribe $1,000,000 more to the capital stock of the company, and to make payment thereof by issuing and making sale of the bonds of the State, under the same provisions, regulations, and restrictions prescribed for the sale of the bonds theretofore issued and sold to pay the State's original subscription, and the same pledges and securities were thereby given for the faithful payment and redemption of the certificates of debt then authorized, as were given for those issued under the direction of the first act.

This stock was by the terms of the act to be a preferred stock. The subscription was made and certificates of debt, in the same general form as the first, issued to provide the means of payment.

The plaintiff is the owner of five certificates of the first issue and two of the second. The interest on the first issue, payable January 1st, 1869, and after, and on the second, payable April 1st, of the same year and after, was unpaid, when this suit was commenced.

This action is prosecuted for the benefit of all bondholders, who may come in and make themselves parties. About $1,800,000 of the indebtedness is now represented. No certificate for the stock, upon either of the subscriptions, had been issued by the company at the time of the commencement of this action. Since that time, upon the order of the court, the proper certificates have been issued and placed in the hands of a receiver appointed in this cause, who has collected the dividends thereon as they have from time to time been declared and paid. These dividends as far as received, have been applied to the payment of interest, but there is still a large amount in arrear, and the plaintiff now asks that a sufficient amount of the stock may be sold to pay what is past due.

It is first insisted by the defendants, that the State of North Carolina is in fact a party defendant, and consequently that this court cannot entertain jurisdiction of the cause.

The State, although directly interested in the subject matter of the litigation, is not a party to the record. The eleventh amendment to the Constitution of the United States provides, that no suit can be prosecuted in this court against a state, by the citizens of another state, or by citizens or subjects of a foreign state. It has long been held, however, that this amendment applies only to suits in which a state is a party to the record, and not to those in which it has an interest merely.

It is next urged that, if the State is not actually a party to the suit, it is a necessary party, in whose absence the cause cannot proceed, and that as the State cannot be brought into court, no relief should be granted upon the case made.

If the State could be brought into court, it undoubtedly should be made a party before a decree is rendered, but since the case of *Osborn* v. *Bank of the United States*, reported in 9th Wheaton, 739, it has been the uniform practice of the courts of the United States to take jurisdiction of causes affecting the property of a state in the hands of its agents, without making the State a party, when the property or the agent is within the jurisdiction. In such cases the courts act through the instrumentality of the property or the agent.

The main question, therefore, presented for our determination is whether the court has jurisdiction of the property which it is sought to charge, or of the agent of the State having it in possession.

The property consists of shares in the capital stock of a corporation. At its inception it became charged as security for the payment of a debt of the State contracted on its account. This was part of the law of its creation. It has always been pledged.

The property of a corporation represents its stock. This property the corporation holds for its stockholders. A stockholder's share of the stock is equal to his share of the corporate property. The railroad company, therefore, in this case holds the share of its property represented by the stock subscribed by the State, in trust, as well for the bondholders as for the State. The charter made the company the depository of the pledge to hold it for both parties according to their respective interests. Consequently a suit which seeks to charge the stock as security, and brings the corporation in to represent it, may be maintained in the absence of the State as a party. This was evidently the understanding of the parties when the pledge was made. It was then the case, as now, that a state could not be sued, but that its agents could, and that property in the hands of its agents could be controlled and disposed of by the courts in proper cases, notwithstanding the ownership by the State. The faith of the State is here pledged. This pledge the courts could not enforce. The stock to be obtained with the money borrowed could not be reached under such a pledge of faith alone, because a suit could not be prosecuted for that purpose.

Understanding this, a lien was given upon the stock as security, "in addition" to the pledge of faith. But it was no addition, if the bond holder had no power to make his security available. A lien which cannot be enforced has no value as a security. These parties were engaged in no such vain work. It was clearly their understanding that the State not only should, but that it in fact did, grant to the bondholders the power to use the machinery of the courts to subject this portion of their security, if default should be made in the payment of the debt.

In sustaining this action, then, we are but carrying into effect the manifest intention of the parties at the time the money was borrowed.

The next objection is that the stock was pledged as security for the payment of the principal of the debt alone, and not the interest, and that as the principal is not yet due there can be no decree for a sale.

The stock was pledged for the "redemption of the certificates of debt." The certificates bound the State "for the payment of the sum therein mentioned, with interest thereon." Thus it is apparent that the interest is as much a part of the obligation of the certificate as the principal. If more is necessary to sustain this view, it is to be found in a subsequent part of the section, where it is provided that, "the *principal* of the certificate shall be redeemable," &c. If it had been supposed that the certificate only related to the principal, it would have been sufficient to provide for the time of the redemption of the certificate, the same as when in sec. 41, "the security for the redemption of the certificates" was designated and granted.

If then the certificate bound the State for the payment of both principal and interest, it would seem to follow most unquestionably that whatever was given as security for its redemption could be held for the performance of all its obligations.

But it is argued that the dividends are specially designated as security, and the only security, for the payment of the interest. The language of the act is that the dividends "shall be applied to the payment of the interest accruing on such certificates." This was additional security. Without it (as the State could not be sued) there was no power to compel this application. With it, there was. The officer in whose custody the dividends were placed, was, so long as the funds remained in his hands, amenable to the process of the courts to compel him to do what the law required of him.

It is again claimed that, as it was made the duty of the treasurer, until dividends were delivered, to pay the interest as it accrued out of any moneys in the treasury not otherwise appropriated, it could not have been intended that the stock should be held for anything but the principal. This, too, was additional security. Without it the bondholder had no power to enforce the payment of the interest. With it, after default, upon a proper showing, the treasurer could be compelled to apply the unappropriated moneys in his hands to discharge that obligation.

Neither can an argument in favor of the claim of the defendant be drawn from the fact that the stock is pledged for the redemption of the certificate. It is true the principal of the certificate was made redeemable at the end of thirty years, and that the interest thereon was payable semi-annually. The certificate could not be redeemed until both principal and interest were paid.

Redemption and redeemable are therefore, in this connection, only other names for payment and payable, and the General Assembly appears to have used the words as though they conveyed the same meaning.

If the stock was not given in security for the interest, then the faith of the State was not pledged for its payment, for that, like the stock, was only pledged for the redemption of the certificate. So, too, if no payment of interest should be made during the whole thirty years, no part of the stock could be applied to its payment then, even though its value should be sufficient to discharge both principal and interest. If the stock is held at all for the payment of the interest it is held all the time and may be subjected at any time after a semi-annual instalment falls due.

For these reasons we are clearly of the opinion that the plaintiff and

those he represents are entitled to have their proportion of the stock, or so much as may be necessary, sold to pay the past due interest upon their bonds. They can act, however, only for themselves. So much of the stock as equitably belongs to them as security, they can control in this action, but no more. The security is divisible and should be apportioned to the various bondholders according to the amount of their respective claims. Each bondholder should have an amount of stock, which bears the same proportion to the whole stock that his bonds do to the whole bonds outstanding. We are not willing, however, to order that a sale be made until ample time has been given the State to provide, by levy and collection of taxes, the necessary funds for the payment of the interest now past due, and such as may fall due before the money can be realized and be applied. An account may be taken of the amount due for unpaid interest upon the bonds presented in this cause, and of such as will mature on or before the first day of April, 1875, and a decree entered that if full payment thereof is not made by that day, so much of the stock apportioned as security to the plaintiff and those he represents as may be necessary to pay the same, be sold. If on or before the day of sale it shall be made to appear to the court that the State has in good faith levied a tax to pay the arrears of interest on the debt, and provided for its collection, the sale will be further suspended until a sufficient time shall have elapsed for the collection to be made.

CIRCUIT COURT OF THE UNITED STATES. — WESTERN DISTRICT OF MICHIGAN.

[MARCH, 1874.]

REMOVAL OF CAUSES. — POWER OF UNITED STATES COURT TO ACT DURING PENDENCY OF QUESTION OF JURISDICTION. — WASTE.

WARREN v. *IVES.*

A United States court may exercise authority over property involved in a suit which has been removed to it, far enough to protect the rights of the parties, even if its jurisdiction in respect of such suit be uncertain and the question thereof pending. Thus it may, in an emergency, under such circumstances, issue its injunction to prevent waste.

THE facts appear in the opinion.

WITHEY, J. In 1872 Stewart Ives commenced suit by bill in equity in the state court of Mecosta County, against George B. Warren and others, claiming to be the owner of a tract of some four thousand acres of land, by title derived from Chauncy P. Ives, and alleging that said Chauncy P. Ives, prior to the conveyance to Stewart Ives, had, by deed, absolute on its face, of date July 15, 1859, conveyed the same land to George B. Warren and Frederick B. Leonard, to secure indebtedness from the grantor to the grantees. The bill claims such prior conveyance to be

but a mortgage, prays for an accounting, offers to pay any balance found due to Warren and Leonard, and asks that the deed to them be decreed to be cancelled.

Warren and the other defendants, being citizens of New York, petitioned to have the cause removed to this court, which was opposed, but the state court held the petition to be sufficient, and ordered the removal. In May, 1873, the papers were presented and allowed to be filed in this court. This was followed by a motion of Ives to remand for non-compliance with the act of Congress providing for the removal of causes from the state to the national courts. After hearing that motion, my impression was that the cause ought to be remanded, but the question raised was new and the case an important one. I therefore reserved the motion for hearing before the circuit judge, and ordered it placed on the reserved list. Owing to Judge Emmons' continued absence, the motion has not been heard.

On the 25th February last, the cause and parties being thus situated, Mr. Warren, by leave, filed his cross-bill in this court against Stewart Ives and others, in which he sets up his title in fee to the land in question; claims the conveyance of July 15, 1859, from Chauncy B. Ives to Warren and Leonard, was not only absolute in form, but made, executed, and delivered as such, and not for the purpose of securing indebtedness. Statements are made in the bill for the purpose of showing the absolute character of the deed, and of the intention of the parties to it. The lands are shown to be principally valuable for their standing pine timber, and defendants, or some of them, have, during the winter of 1873–4, cut and removed a large quantity of the timber, and were, when the bill was filed, still at work cutting and removing the timber. Complainant prays that his title be confirmed, and that defendants be restrained from committing waste, and from sawing, selling, or using the saw-logs already removed, etc. A provisional injunction was issued, and an order granted on defendants to show cause. They have answered, and filed affidavits against the injunction. The showing is conclusive on the question of waste, and if the court has power to protect the lands from depredation, pending a settlement of the question of title, it should be exercised.

Jurisdictional questions are urged by defendants' counsel, and these I proceed first to dispose of. It is claimed that the bill filed by Warren is a cross-bill, and as such cannot be sustained, for the reason that there has been no removal of the cause of Ives against Warren and others from the state court. Again, that, as an original suit, this court has no jurisdiction of complainant's bill, inasmuch as it covers the same subject matter and is between the same parties in interest as the suit brought by Ives in the state court.

When the bill of complaint of Warren was presented to me for leave to file, and for an order for a provisional injunction against waste, I understood it to be framed with a double aspect, asking that the bill stand as a cross-bill if the motion to remand was denied, or as an original bill in case that motion should prevail. By reference to page 26 of the printed bill, it will be seen that such must have been the original intention of the pleader, but its language very singularly asks that the bill may stand as a cross-bill in either event. Thus framed, the clause wants appropriateness and proper expression. After what complainant's counsel has said

at the argument, that the bill was designed to be in the alternative, I shall so regard the case, and permit an amendment at once and without terms.

Touching the status of the suit brought by Mr. Ives in the state court, and sought to be removed to this by Warren and others, it is urged that inasmuch as I intimated the petition to be defective, on the argument of the motion to remand, any exercise of jurisdiction now by the court over that case would be inconsistent with such expressed views, and *primâ facie* unauthorized. This objection assumes the bill filed by Warren to be a cross-bill and nothing more, whereas it was, as already explained, presented and allowed to be filed either as a cross-bill or as an original bill, depending upon the disposition which should ultimately be made by Judge Emmons of the motion to remand. As I shall show when the second objection is discussed, jurisdiction attaches to Mr. Warren's bill as an original bill if the suit by Ives is dismissed to the state court. But I entertain the view that, as a cross-bill, the court would be justified in asserting jurisdiction. The question is new, for I find no authorities to govern me; but, *primâ facie*, the suit of Mr. Ives has been removed from the Mecosta circuit court, and is pending here. That court ordered the cause removed, and it was so far consummated that the papers were taken from that into this court, and here filed and the case docketed. The state tribunal, by an order of removal granted after a hearing, judicially declared itself without further jurisdiction, and would not now probably assert further jurisdiction. The case is one clearly within the act of Congress providing for the removal, and defendants in that suit have attempted, and, as they claim, successfully, to comply with the statute. This court has so far entertained the cause as to hear a motion to remand, after allowing the papers to be filed, and without deciding the motion, has allowed a provisional injunction to protect rights for the time being. The simple fact that the jurisdiction of this court is challenged does not raise a *primâ facie* case against it, nor do I quite appreciate why a previous intimation against retaining the cause, but which intimation is not a decision, should have the effect claimed of preventing the court from giving such incidental protection as the rights of the parties require, while the jurisdictional question is pending and undetermined. For the present the controversy is pending here *primâ facie*, and while courts are careful not to exercise a doubtful jurisdiction, they will not, while parties are before them under a claim of right, refuse to protect the interests of the parties in an emergency like the present one, from the fact that jurisdiction is questioned or even doubtful.

But, as I have already said, the bill by complainant Warren is not to be regarded merely as a cross-bill for the purposes of this motion. Whether it will stand here as a cross or as an original bill depends upon the future disposition of the motion to remand. It is claimed, however, that by the well recognized rule of comity, this court will not entertain a suit where it appears the same parties in interest are litigating the same subject matter in a state court. The proposition is fully conceded, and if we are to regard this bill as an original and not as a cross-bill, then the rule of comity insisted upon fails to defeat jurisdiction, for the reason that it appears that the question of an injunction to restrain waste is not involved in the suit by Ives against Warren and Leonard; and although

the title to the land is in controversy in that suit, this court may properly entertain a suit between the same parties having for its object the prevention of waste pending the litigation in the state tribunal. Citizenship of the parties and the amount in controversy, as well as the subject matter, injunction, gives to complainant the right to invoke the jurisdiction and power of this court to protect his rights in the land; and so far as those rights are not involved in the other suit, this court has no right to refuse what the act of Congress imposes as a duty.

It is true this bill is framed to meet an emergency, and, therefore, is not more than an injunction-bill, inasmuch as it asks no other relief than an injunction. The undetermined question on the motion to remand the Ives suit induced and justified framing the bill in this present aspect.

Should the Ives suit be remanded, it would be competent for complainant to so amend the prayer of his bill as to render it simply an injunction-bill, and under the circumstances attending the case, the court would so administer the rules of practice as to accomplish the end and purpose of jurisdiction instead of defeating them. It is one of the distinguishing features of equity that it adapts itself to the circumstances and rights of parties, when once its jurisdiction attaches, so that if it cannot give the precise remedy asked, it will grant such as the very right of the matter demands under the general prayer for other relief. Upon the whole I am not in doubt as to jurisdiction.

Authorities were cited and discussion had touching the absolute or conditional character of the deed of July 15th, 1859, by Chauncy P. Ives to Warren and Leonard; it is enough to dispose of that question for the present, that the showing here leaves that consequence in doubt. "Who owns the land?" is the principal and vital question at issue, and when the evidence shall be before the court, it can be more intelligently determined. Thus far the showing on both sides is necessarily incomplete, and, as it is *ex parte*, is unsatisfactory for the purpose of passing on the absolute or conditional character of such deed. This belongs to the final hearing, and should await that stage of the cause. Meanwhile neither party ought to be suffered to remove the timber, which is the chief value of the land. So far I feel constrained to go under the showing. But Mr. Ives having been suffered to remove timber during the winter of 1873–4, and having a steam-mill to be stocked from the logs got in part from the lands in question, to enjoin him from sawing and disposing of this lumber, would work great if not irreparable injury to him. I am not disposed to do that which will break up his business, under all the facts and circumstances of the case. Mr. Warren is not without remedy at law for the value of the timber cut, or by replevin for the logs, if he is owner. If the deed is but a mortgage, then the land and remaining timber, worth not less than one hundred and twenty thousand dollars, are ample security for his debt.

The injunction will be modified to prevent cutting the timber, and continued.

SUPREME COURT OF PENNSYLVANIA.

[MAY, 1874.]

ASSIGNMENT OF DEBT NOT IN ESSE. — REQUISITES OF VALID TRANSFER OF SUCH DEBT.

JERMYN v. *MOFFITT.*

An assignment of a debt to arise for wages not yet earned, against any person by whom the assignor may thereafter be employed, although followed by a subsequent notice of the assignment to such an employer, is insufficient, without acceptance, to make a valid transfer of the debt against the employer.

OPINION by MERCUR, J. The first assignment of error is to the answer of the court on an abstract proposition submitted by the plaintiff in error. In view of the broad and general terms in which the point was presented, we see no error in the answer. In some cases a valid assignment may be made of moneys thereafter to be made, or of grain thereafter to be grown: *Grantham* v. *Hawley*, Hobart, 132; or of the future earnings of a railroad; *Bittenbender* v. *S. & E. R. R. Co.* 4 Wright, 270. If counsel desire an answer applicable to the evidence in the case being tried, they should so indicate it in their point submitted.

The second assignment involves the sufficiency of the transfer to give a right of action to Moffitt against Jermyn. Leslie assigned to Moffitt "five dollars a month of my earnings in the employment of the Delaware and Hudson Canal Company, or with whomsoever I may be employed, until the amount due said Moffitt is paid." Jermyn's name is not mentioned in the assignment. It does not appear that, at the date thereof, Leslie was in his employ, or that any business relations then existed between them.

The court charged substantially, if Moffitt did, within a few months after the assignment was made, hand a copy of it to Jermyn, and Leslie continued in his employment thereafter, then Jermyn became responsible to Moffitt at the rate of five dollars a month out of wages so earned by Leslie, until the amount due from the latter to Moffitt was paid. The answer wholly excludes from the jury all question in regard to any acceptance by Jermyn, and any express or implied agreement of his, to pay. The court assumes as matter of law, that if Moffitt merely handed a copy of the assignment to Jermyn, and Leslie thereafter continued in his employ, it gave Moffitt a right of action against Jermyn. It is true, where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee, it binds the fund in his hands. Where, however, the assignment is of a part only of the fund the law seems to be otherwise. Thus, it was said by Mr. Justice Story, in giving the opinion of the court in *Mandeville* v. *Welch*, 5 Wheat. 277, "When the order is drawn on a general or a particular fund for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation

by an acceptance of the draft; or an obligation to accept may be fairly implied from the custom of trade or the course of business between the parties, as a part of their contract." The reasons which he gives are, that a creditor should not be permitted to split up a single cause of action into many actions, without the assent of his debtor, thereby subjecting the latter to embarrassments and responsibilities not contemplated in his original contract. It was held in *Gibson* v. *Cook*, 20 Pick. 15, that the assignment of part of a debt will not bind the debtor, either in equity or at law, nor deprive him of the right to pay the whole to the assignor, after notice that a part has been transferred to the assignee. All the decisions relating to this question of assignment are not in entire harmony. We shall not now attempt to reconcile them. We, however, are clearly of the opinion that an assignment like the present one, which professes to transfer a debt to arise for wages not yet earned, against any person by whom the assignor may thereafter be employed, although followed by a subsequent notice of the assignment to such an employer, is insufficient, without acceptance, to make a valid transfer of the debt against the employer. The second assignment of error is sustained.

Judgment reversed, and a venire facias de novo awarded.

CIRCUIT COURT OF THE UNITED STATES. — EASTERN DISTRICT OF NORTH CAROLINA.

[JUNE, 1874.]

INJUNCTION. — TREASURER OF STATE. — MISAPPLICATION OF APPROPRIATION FOR SPECIFIC PURPOSE.

SELF v. *JENKINS.*

A court has no power to restrain the treasurer of a state from paying out money in pursuance of law upon the ground that an earlier appropriation for a specific purpose has been misapplied. The treasurer as an agent of the State is bound only to pay its debts when required to do so by law.

THE facts are set forth in the opinion.

The opinion of the court was delivered by

WAITE, C. J. Article V. Section 5 of the Constitution of North Carolina is in these words: —

"Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be sub-

mitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

Article V. Section 8, is in these words:

"Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose."

The Wilmington, Charlotte, & Rutherford Railroad Company was incorporated in 1855, to construct a railroad from Wilmington to Rutherford. This railroad was unfinished at the time of the adoption of the Constitution.

By an act of the General Assembly, passed on the 29th January, 1869, the capital stock of this company was increased to seven millions of dollars, and, in order to complete the road, the public treasurer was directed to subscribe four millions of dollars to the stock. The payment of this subscription was to be made in the bonds of the State having thirty years to run, the interest, at six per cent. being payable semi-annually. To provide for the payment of the interest and the principal at its maturity, the act imposed an annual tax of one eighth of one per cent. upon all the taxable property of the State, to be levied, collected and paid into the treasury as other public taxes.

This authorized subscription was made, and bonds to the amount of $3,000,000 delivered to the president of the company in part payment.

The special tax provided for was levied in 1869, and $151,491.13 collected therefrom and paid into the state treasury. Out of this, $29,400 was paid on account of the interest accruing upon the bonds, but on the 20th of January, 1870, a resolution was adopted by the General Assembly instructing and directing the treasurer not to pay any more until authorized by the General Assembly, and he thereupon suspended the payment.

On the 8th of March, 1870, the General Assembly repealed the act making appropriations to the railroad company, and directed all the bonds then in the hands of the president to be returned to the treasurer.

On the 12th of the same month, the General Assembly, by a law duly enacted, directed the treasurer to use $150,000 of the special tax funds, in payment of the ordinary expenses of the state government, and to repay advances theretofore made by the board of education, and authorized him to replace the same out of the first moneys which might come into his hands by way of dividend of corporations or of taxes theretofore or thereafter to be levied.

By another act passed December 20, 1870, he was directed to use $200,000 more of the same funds, in payment of the ordinary expenses of the state government, and the appropriation for the charitable and penal institutions, and to replace the same from the first moneys paid into the state treasury from dividends, or taxes levied and collected for general purposes.

In accordance with these directions, the treasurer used $122,091.13 of the fund collected to pay interest on these bonds, for the purposes specified in the acts.

On the 20th of December, 1871, the treasurer was forbidden by the General Assembly to apply any money collected under the revenue act of

1871, to the repayment of any moneys borrowed under the act of December, 1870.

On the 3d of March, 1873, another act was passed, entitled "An act to raise revenue," and by its terms the taxes therein levied were applied to defray the expenses of the state government, and to pay the appropriations for charitable and penal institutions. A similar act, with similar application of the funds to be raised, was passed in 1874.

The plaintiff is the holder of certain of the bonds issued to the above named railroad company, on which no interest has been paid, and in this bill he asks that the treasurer may be restrained from the payment of any moneys out of the treasury of the State, until he has replaced the $122,091.13 borrowed by him from the special tax fund, applicable to the payment of the interest on the bonds issued to the said company.

The facts are all admitted by the pleadings, and the simple question presented for our determination is, whether upon such facts, the relief asked for can be granted.

The use of the special tax funds to pay the general expenses of the government was in violation of the Constitution, and therefore unlawful, but the wrong, if any exists, has been done. We are not now called upon to prevent the act, but to relieve against its consequences. The first, upon a proper application made in time, we might have done. The question now is, whether, upon this application, the latter is within our power.

The treasurer is a public officer. His office belongs to the executive department of the State. His duty is to execute the laws, not to make them. He, within his official sphere, carries into effect the will of the Legislature, and can only do what the law permits.

The courts will not by *mandamus* compel a public officer to do that which the law does not authorize. Neither will they restrain him from doing that which the law requires. An unconstitutional law is no law, and the court will, when properly called upon, restrain its execution, because it cannot authorize action by any one. It is for this reason that the wrongful application of this money might have been prevented. The law directing it, being unconstitutional, conferred no authority upon the treasurer to do what was required. It is quite another thing, however, to compel him, in his official capacity, to substitute other moneys now in the treasury for that which he has improperly used.

That, in substance, is what we are called upon to do in this case. True, the form of the prayer is that the treasurer be restrained from paying out money from the treasury, but the real object is to compel him to retain in the treasury an amount equal to that which he has misapplied. This requires a refusal by the treasurer to pay the orders drawn upon him to the proper authorities, pursuant to law. He is but the custodian of the public money. He has no discretion as to its use. It is held to be paid out and appropriated as the law directs.

The immediate question for our determination, therefore, is, not whether the State should provide the means and require the treasurer to replace this fund, but whether it has so done. When the order to use the $150,000 was made, the treasurer was authorized to replace it out of the first money which came into the treasury by way of dividends or taxes. When that of the $200,000 was ordered, he was authorized to replace it from

dividends and taxes for general purposes. The revenue act of 1871, however, expressly prohibited him from using for that purpose any money collected under its authority. The acts of 1873 and 1874, do not contain any such prohibition, but they each direct that the taxes levied shall be applied to defray the expenses of the state government, and to pay appropriations for charitable and penal institutions. This is the statement of the special object to which the taxes are to be applied, required to be made in every law levying taxes, and the Constitution expressly prohibits their application to any other. While, therefore, the law does not prohibit the reimbursement of the special tax fund out of the money raised under its authority, the Constitution does. The expenses on account of which the money was taken from the fund, have already been paid with the money of the State. It is true, the money paid ought not to have been so used, but it was none the less on that account the money of the State. The bondholders might perhaps, if the money still remained in the treasury, compel its application to the payment of the interest on their bonds, but until so applied it did not become their property, and remained that of the State.

It is not claimed that there is now any money in the treasury, except that which has been collected from taxes levied under the revenue laws of 1873 and 1874, and it is clear to our minds that there is no existing law which requires, or even authorizes, the treasurer to reimburse the special fund from that. The State may be under obligation to provide for such reimbursement, but the State and the treasurer occupy different positions. The State is the debtor and bound by its pledge of faith to provide means and pay its debts. The treasurer is but an agent of the State, and bound only to pay its debts when required to do so by a valid law. If such a law exists and he refuses to act, a proper court will by *mandamus* compel him to perform his duty. If he threatens to divert money appropriated for the payment of a debt, on proper application, he may be restrained. But to authorize interference in either case, it must clearly appear that he wrongfully refuses to execute a valid law which has been enacted by the legislative department for his guidance. The court cannot make laws for him. It can only compel him to execute such as have been made.

As there is therefore no money in the treasury which the treasurer is authorized or required by any existing law to appropriate for the reimbursement of the special tax fund, we cannot restrain him from paying out the funds in his hands until the reimbursement has been made. The principal in this case cannot be reached through the agent now before the court.

The bill is dismissed with costs.

DISTRICT COURT U. S. — NORTHERN DISTRICT OF ILLINOIS.

[JUNE, 1874.]

BANKRUPTCY. — PRACTICE UNDER ACT OF JUNE, 1874, IN RESPECT OF PETITIONING CREDITORS IN INVOLUNTARY CASES.

IN RE SCAMMON.

Under the amendatory bankruptcy act of June 22, 1874, the petition of creditors in involuntary cases must show affirmatively a compliance with the provisions of the act as to number and amount of claims of creditors.

In cases pending at the time of the passage of the act the petition may be amended and made to contain the allegations of the requisite number and amount.

The petition must, also, contain a jurisdictional allegation.

And the amended petition should be sworn to as if it were an original paper.

The naked allegation that the number and amount of creditors required have joined in the petition is not sufficient, even though it be admitted by the debtor that the allegation is true. The court must be satisfied of the facts as they exist.

BLODGETT, J. I must confess that the question raised is not entirely free from doubt in my own mind. But there are some provisions of the law that are sufficiently clear. The thirty-ninth section of the original bankrupt act of March 2, 1867, is substantially and practically repealed, and a new section enacted in place of it. The new section enumerates the acts which shall constitute acts of bankruptcy, and for which a party may be forced into involuntary or compulsory bankruptcy, and proceeds as follows: —

"And subject to the conditions hereinafter prescribed shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one third of the debts so provable."

Now this must be done on the *petition* of that number of creditors. It is manifest, then, that from the time this becomes a law no person can be adjudged a bankrupt unless the requisite number of creditors join in the petition, because it must be upon their petition; and it is very clear to me that the practice indicated by the whole tenor of the law in respect to cases hereafter commenced is, that the petition must affirmatively show that the requisite number of creditors in number and amount have united therein. I do not think, as has been argued, that this allegation as to the number of creditors must necessarily be so positive that the party could be prosecuted for perjury upon it. It may be stated (and I shall so hold, until some higher court decides the contrary) upon the information and belief of petitioning creditors, that they do constitute one fourth in number and one third in amount of the aggregate creditors, because we all know that creditors are very liable to be misinformed by debtors as to the extent of their (the debtors') indebtedness. Cases occur almost daily in practice in which debtors have represented to their creditors that they

owed only a very small amount of debts, in which, when the facts came to be developed, their entire indebtedness largely exceeded the amount stated. Creditors, of course, in preparing petitions in the first instance speak according to the light they possess at that time. I think, therefore, it will be a sufficient compliance with the provisions of the law that they state on their information and belief that they do constitute one fourth in number and one third in amount of the creditors of the debtor named.

Then the law provides that if the debtor wishes to traverse this allegation he can do so by a statement made in writing that the requisite number of creditors have not joined in the petition, whereupon the court shall require the debtor forthwith to file a schedule of his creditors with the court, which, of course, must be, so far as he is concerned, conclusive; and if the creditors succeed, within the time limited by statute, in obtaining the consent of the requisite number of the creditors mentioned in the schedule filed by the debtor himself, the proceedings can go on; otherwise the proceedings must lapse. It may also be found necessary in practice to adopt some rule by which the creditor may contest the truth of the schedule so filed by the debtor. So that I see no difficulty in administering the law under the amendment, in respect to cases commenced hereafter.

The only question that has given me trouble has been how to apply the law to cases already pending which have been commenced since the first of December last. Taking all the parts together, it appears to me that it has become necessary, since the passing of the amendatory act, that the creditors who wish to prosecute this class of cases should apply to the court for leave to amend their petitions and join the requisite number of creditors in the prosecution of the cases. Otherwise we must hold as nugatory and of no application some part of the language of this section. After providing, in the way I have already read, that the person guilty of any of the several acts of bankruptcy enumerated, may be declared a bankrupt on the petition of the requisite number of creditors, the law then provides that, "in all cases commenced since the first day of December, 1873, and prior to the passage of this act, as well as those commenced hereafter, the court shall, *if such allegation as to the number or amount of petitioning creditors be denied by the debtor by a statement in writing to that effect*, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one fourth in number and one third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt." This clause applies as well to cases to be commenced as to cases commenced since the first of December, 1873; and, as was well remarked yesterday in the discussion of this case, it is contrary to all the analogies of pleading in other cases, that a party should be called upon to deny a statement which has not been made against him. The language of the law is: "If such *allegation* as to the number or amount of petitioning creditors be denied by the debtor." There must be an allegation, somewhere, then. The creditor, before he can require the debtor to file a schedule of his debts, must allege, in substance, that one fourth of the creditors in number and one third in amount have joined in the petition, or do unite in the petition, and in the request to

have the debtor adjudicated a bankrupt. There must be some allegation of that kind before he can be called upon to deny it. And I can see no special hardship in this which the law may not properly impose. A creditor who has already filed a petition may as easily obtain the consent of the requisite number to prosecute as a creditor who is about to commence proceedings to obtain such consent as a condition precedent. It seems to me that the jurisdictional fact on which the court has the right to proceed is that the requisite number of creditors have acceded to the continuance of proceedings. The court, indeed, loses jurisdiction over the case unless it is made to appear affirmatively by the petitioning creditor that the requisite number of creditors request and demand the adjudication of the debtor as a bankrupt. The allegation (as I stated at the outset) that the requisite number of creditors have joined in the petition makes a *primâ facie* case, makes a case on which the court can grant a rule to show cause, and the debtor is allowed the privilege of coming forward and showing that the requisite number of creditors have not joined in the petition. But it also imposes on the debtor the obligation of disclosing the number of his creditors, their places of residence, the amounts of their debts, so that their assent can be obtained within a reasonable time.

Further, I derive much support in this view of the case from the clause of the act which reads: "And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, *in cases heretofore commenced, twenty days*, and in cases hereafter commenced, ten days, within which other creditors may join in such petition."

Here is a difference of ten days given in favor of creditors who have already initiated proceedings, in the time granted within which to obtain the consent of the requisite number of creditors to the continuance of the proceedings. It seems to me that this clause was placed there on purpose to enable a creditor who had already instituted proceedings to take the initial step to amend his petition, and seek the coöperation of such a number of creditors as was necessary to retain the jurisdiction. It cannot be supposed from the whole language of the statute taken together, that Congress intended to legislate this class of cases out of court entirely. The court cannot put that construction on the law. The only question is, Did Congress intend that where a petition had been filed since the first of December, 1873, by a single creditor, representing perhaps not over $250, he should be allowed to proceed and prosecute that case to a conclusion, unless the debtor himself should come in and object and file a statement of the names of his creditors, and amounts of their respective debts, together with their residences, so that the creditor could obtain their assent? Taken with the clauses I have read, I do not think that can be construed to be the intention of the act; but it seems to me that the debtor is entitled, first, to have an allegation placed upon the record that the requisite number of creditors do desire an adjudication. He may then deny that allegation, and show that the requisite number of creditors do not desire his adjudication in bankruptcy. And when he has made that statement, the petitioning creditor has the right to take twenty days in which to obtain the assent of the requisite number. The reason for making a distinction between the time allowed in cases already petitioned and in cases

hereafter brought, is manifestly this: Where creditors bring a case after the passage of the law, they are supposed to act in the light of what has already transpired, and have some information upon the extent of the indebtedness of the debtor. They are supposed to have investigated, so far as opportunities would enable them, the financial condition of their debtor, and ascertained approximately the facts in the case. With respect to cases commenced before the amendment went into force, they are supposed not to have made such investigation. Therefore extra time is given them before they will be put out of court. Now the creditor, under the practice suggested, in cases which are pending, could come into court and ask leave to amend his petition in the respect I have indicated. On the request being granted and the amendment made, the debtor will have the privilege, as in cases hereinafter brought, of denying that the requisite number of creditors have assented. Then he will be required to file his schedule. The argument of inconvenience is one which the court cannot consider. The bankrupt law is a stringent provision for taking a man's business from his own control, and placing it in the hands of the court or his creditors for the purpose of closing his affairs. If creditors wish to do this, they must do it on the terms of the bankrupt law. The only question is, from whom shall the objection first come, or by whom shall the allegation be first made, that the requisite number of creditors have not joined in the petition for adjudication. Taking the whole scope of the act, it seems to me that in all petitions where adjudication has not already been passed, the allegation must come from the petitioning creditors, and it must be made to appear affirmatively that the requisite number do join in the petition.

Now, take section thirteen, which is an amendment of section forty of the original act. It reads as follows: —

"And if, on the return day of the order to show cause as aforesaid, the court shall be satisfied that the requirement of section 39 of said act, as to the number and amount of petitioning creditors, has been complied with, or if, within the time provided for in section 39 of this act, creditors sufficient in number and amount shall sign such petition, so as to make a total of one fourth in number of the creditors and one third the amount of provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and in cases hereafter commenced with costs."

Thus, it appears, it becomes a matter of inquiry for the court to ascertain and adjudge upon whether the requisite number of creditors have joined; and the reason of that is very obvious. By other provisions in this same amendment to the law, a bankrupt who is forced into bankruptcy under the compulsory clauses of the act is discharged without reference to the amount of dividend which he pays, while a bankrupt who goes into voluntary bankruptcy must pay a dividend at the rate of 30 per cent. It is to guard against collusive proceedings on the compulsory side of the docket that this provision is made, and it is made the duty of the court to investigate and find whether the requisite number of creditors had joined in the proceedings, and whether the proceedings are in good faith. The naked allegation in the petition in regard to the number of creditors who join in the proceeding, although admitted by the debtor,

does not seem to be enough, but the court must inquire into the facts *and be satisfied* that the requisite number of creditors have joined in the petition; and must also be satisfied that the admission of such fact, if admitted by the debtor, is made in good faith. It is hardly necessary to say, then, that I shall hold in all pending cases, that it will be necessary for the petitioning creditors to amend their petitions within a reasonable time, otherwise the case will be dismissed.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1873.]

SUBSCRIPTION TO STOCK OF CORPORATION. — EFFECT OF CONSOLIDATION.

NUGENT v. *SUPERVISORS OF PUTNAM COUNTY.*

A material change in the charter of a railroad company will have the effect of releasing a subscription to its stock. But the change must be something that was not authorized at the time the subscription was made.

A subscription was made by a county to a railroad which was consolidated with another railroad, the charter of the company to which the subscription was made permitting the consolidation. It was held that the subscription was not released by the consolidation.

THE opinion sets forth the facts.

Mr. Justice STRONG delivered the opinion of the court.

We think the circuit court erred in sustaining the demurrer to the plaintiff's replication. The bonds, to which the coupons in suit were attached, purport to have been made and issued by the order of the board of supervisors of Putnam County, in payment of the county's subscription to the capital stock of the Kankakee and Illinois River Railroad Company. They are made payable to that company or bearer, and the plaintiff is a *bonâ fide* holder of the coupons, having paid value for them without notice of any defence. If, then, the bonds are valid obligations, if they were rightfully issued, the right of the plaintiff to a judgment against the county is plain. The material facts relating to their issue, as gathered from the pleadings, may be concisely stated as follows: The Kankakee and Illinois River Railroad Company was a corporation existing in Illinois under a special charter, and it was authorized to construct and maintain a railroad from the eastern line of the State to Bureau Junction. It had liberty to increase its stock to such an amount as might be necessary to complete its road. At the same time the county of Putnam was empowered, by a general law of the State, to subscribe for the stock of the company, and to issue its bonds in payment of its subscription. In attempting to exercise the power thus conferred, the board of supervisors of the county, on the 4th day of June, 1869, ordered an election to be held, to determine whether the county should subscribe for stock of the railroad

company, to the amount of $75,000, to be paid for with the bonds of the county, provided the railroad should be so located and constructed through or within one half mile of the town of Hennepin. The election was held, and it resulted in favor of the subscription. On the 4th day of January, 1870, another election was ordered, to determine whether the county would subscribe for $25,000 more of the stock, to be paid in the same manner, and with a similar provision respecting the location of the road. This subscription was also sanctioned by the popular vote. On the 24th day of September, 1869, the railroad company accepted the $75,000 subscription, and on the 27th of October next following gave notice of the acceptance to the board of supervisors of the county. This notice was put upon record, and on the same day the board of supervisors adopted a resolution that the subscription was thereby made for the building of the railroad, and directed the clerk of the county court to execute and deliver the bonds on behalf of the county. This resolution also declared that the bonds should be issued on the written order of a committee appointed to protect the interest of the county; that they should not be issued until the railroad company should have made a *bonâ fide* contract with responsible parties for all necessary iron for their road, nor until the company should have made a *bonâ fide* contract with responsible parties for laying the iron and operating the road through the county, as specified in a previous order of the board. On the 15th day of March, 1870, the second subscription for $25,000 was made in a similar manner, and with like directions.

That thus the county became, in effect, a subscriber to the capital stock of the railroad company, and liable for the sums designated, admits of no serious question. The fact that no subscription was formally made upon the books of the company is quite immaterial, In *The Justices of Clarke County* v. *The Paris, Kentucky River & Winchester Turnpike Co.* 11 Kentucky Rep. (B. Monr.) 143, it was ruled that an order of the county court, by which it was said that it subscribed for a specified number of shares of road stock, was binding, the court having authority to make a subscription. In this case there was more. There was not only the resolution, declaring the subscription made, but there was an acceptance by the railroad company, and notice of the acceptance. The minds of the parties came together. Both understood that a contract was made; and had nothing subsequently occurred to change their relations, the county could have enforced the delivery of the stock, and the company could have compelled the delivery to itself of the bonds, on performance of the conditions stipulated. So the parties regarded their relations to each other. The bonds were delivered. The committee appointed by the board of supervisors to protect the interests of the county, under whose direction the bonds were ordered to be issued, were satisfied that all the prescribed conditions precedent to their delivery had been complied with, and they so decided. The county accepted the position of a stockholder, received certificates for the stock subscribed, voted as a stockholder, and proceeded to levy a tax to pay the interest falling due on the bonds. Were this all of the case, the validity of the bonds, and of their accompanying coupons, in the hands of a *bonâ fide* holder for value, would be beyond doubt.

The circuit court, however, was of opinion, and so decided, that the

bonds are invalid, because before their delivery the Kankakee and Illinois River Railroad Company had become consolidated with the Plymouth, Kankakee, and Pacific Railroad Company, another corporation. The facts of this part of the case, as set forth in the pleadings, are as follows: On the 12th of January, 1870, a company was organized under the laws of Indiana, for the purpose of building a railroad from Plymouth, Indiana, to the east line of the State of Illinois, at some point to be selected in the direction of Momence and Kankakee, with a view to connection with some railroad leading westward. Its corporate name was the Plymouth, Kankakee, and Pacific Railroad Company. With this corporation, on the 21st day of October, 1870, the Kankakee and Illinois River Railroad Company became consolidated, taking the name of the former. The consolidation was authorized by the general laws of the two states, and by a section in the special charter of the latter company. No claim is made that it was not legally effected. The result necessarily was, that the consolidated company succeeded to all the rights, property, and privileges which belonged to each of the two companies out of which it was formed, before their consolidation. It was not until after this had taken place that the county bonds were handed over and sold, and it was certificates of the stock of the consolidated company which the county received.

What, then, was the legal effect of the consolidation? Did it release the county from its prior assumption to take stock in the Kankakee and Illinois River Railroad Company and give its bonds in payment? Or, did it render unauthorized the subsequent delivery of the bonds, and make them invalid even in the hands of a *bonâ fide* purchaser? These are the only questions presented by the record that need discussion.

It must be conceded, as a general rule, that a subscriber to the stock of a railroad company is released from obligations to pay his subscription by a fundamental alteration of the charter. The reason of the rule is evident. A subscription is always presumed to have been made in view of the main design of the corporation, and of the arrangements made for its accomplishment. A radical change in the organization or purposes of the company may, therefore, take away the motive which induced the subscription, as well as affect injuriously the consideration of the contract. For this reason it is held that such a change exonerates a subscriber from liability for his subscription; or, if the contract has been executed, justifies a stockholder in resorting to a court of equity to restrain the company from applying the funds of the original organization to any project not contemplated by it. But while this is true as a general rule, it has no applicability to a case like the present. The consolidation of the Kankakee and Illinois River Railroad Company with another company was no departure from its original design. The general statute of the State, approved February 28, 1854, authorized all railroad companies then organized, or thereafter to be organized, to consolidate their property and stock with each other, and with companies out of the State, whenever their lines connect with the lines of such companies out of the State. The act further declared that the consolidated company should have all the powers, franchises, and immunities which the consolidating companies respectively had before their consolidation. Nor is this all. The special charter of the Kankakee and Illinois River Railroad Company contained, in its 11th

section, an express grant to the company of authority to unite or consolidate its railroad with any other railroad or railroads then constructed, or that might thereafter be constructed within the State, or any other state, which might cross or intersect the same, or be built along the line thereof, upon such terms as might be mutually agreed upon between said company and any other company. It was, therefore, contemplated by the legislature, as it must have been by all the subscribers to the stock of the company, that precisely what has occurred might occur. Subscribers must be presumed to have known the law of the State, and to have contracted in view of it. When the voters of the county of Putnam sanctioned a county subscription by their vote, and when the board of supervisors, in pursuance of that sanction, resolved to make the subscription, they were informed by the law of the State that a consolidation with another company might be made, that the stock they proposed to subscribe might be converted into stock of the consolidated company, and that the liability they assumed might become owing to that company. With this knowledge and in view of such contingencies they made the contract. The consolidation, therefore, wrought no change in the organization or design of the company to which they subscribed, other than they contemplated at the time as possible and legitimate. It cannot be said that any motive for their subscription has been taken away, or that the consideration for it has failed. Hence the reason of the general rule we have conceded does not exist in this case, and consequently the rule is inapplicable.

In a multitude of cases decided in England and in this country, it has been determined that a subscriber for the stock of a company is not released from his engagement to take it and pay for it by any alteration of the organization or purposes of the company which, at the time the subscription was made, were authorized either by the general law or by the special charter, and a clear distinction is recognized between the effect of such alterations and the effect of those made under legislation subsequent to the contract of subscription. In the *Cork & Youghal Railway Company* v. *Patterson*, 37 Eng. Law. & Eq. 398, which was an action to recover a call of one pound per share on one hundred shares subscribed, it appears that the defendant was one of the subscribers to the agreement for the Cork, Middleton & Youghal Railroad Company. That agreement authorized the provisional directors to extend the purposes of the organization, to change the termini of the road, and to amalgamate with other companies. The subscriber's agreement for the Cork & Waterford Railroad Company contained similar provisions. After the defendant's subscription was made, the two companies executed a deed of amalgamation, without any other assent of the defendant than his signature to the subscriber's agreement for the first named company. Upon this state of facts all the judges held that he remained liable on his subscription. Its effect was said by Chief Justice Jervis to be an authority to the company to tack his subscription to anything else they might see fit, and thus make him a subscriber to that; and therefore, added the judge, by signing the Cork & Youghal he afforded an authority to the directors to apply his signature to the Cork & Waterford, and so make him a subscriber to that. To the same effect are the cases of *Nixon* v. *Brownlow*, and *Nixon* v. *Green*, 3 Hurl. & Norman, 686. The American authorities are equally

explicit. They uniformly assert that the subscriber for stock is released from his subscription by a subsequent alteration of the organization or purposes of the company only when such alteration is both fundamental *and not provided for or contemplated by either the charter itself or the general laws of the State.* In *Sparrow* v. *The Evansville & Crawford Railroad Company*, 7 Porter, Ind. 369, where it appeared that after a public act had taken effect authorizing the consolidation of the charters of two railroad companies, the defendant had subscribed for shares in one of them, and a consolidation was afterwards made, he was held liable to the consolidated company for his subscription, and this, though the consolidation took place without his knowledge or consent. The same doctrine was asserted in *Bish* v. *Johnson*, 21 Ind. 299. See also *Hanna* v. *Cincinnati, &c. R. R. Co.* 20 Ind. 30. The supreme court of Connecticut recognized the rule in *Bishop* v. *Brainard*, 28 Conn. 289, and a subscriber to one company was held to be a debtor to the consolidated company in a case where there was no general authority to consolidate, but the charter of the company was subject to amendment by the legislature, and where the legislature, after the subscription, confirmed the consolidation. Vide also *Schenectady & Saratoga Plank-road Co.* v. *Thatcher*, 1 Kernan, 102; *Buffalo & N. Y. City R. R. Co.* v. *Dudley*, 4 Kernan, 336; *Meadow Dam Co.* v. *Gray*, 30 Maine, 547; *Agricultural Branch R. R. Co.* v. *Winchester*, 13 Allen, 29; *Noyes* v. *Spaulding*, 27 Vt. 420; *Pacific R. R. Co.* v. *Renshaw*, 18 Mo. 210; *Fry's Executors* v. *Lexington, &c. R. R. Co.* 2 Met. Ky. 314; *Illinois River R. R. Co.* v. *Beers*, 27 Ill. 185; *Terre Haute & Alton R. R. Co.* v. *Earp*, 21 Ill. 292.

Many other citations are at hand, but these are sufficient. No well considered cases are in conflict with them. *Marsh* v. *Fulton County*, 10 Wall. 676, is altogether a different case. In that it appeared that the people of the county voted in November, 1853, in favor of a subscription for stock in the Mississippi & Wabash Railroad Company, and in April, 1854, the board of supervisors of the county ordered their clerk to make the subscription. It was not, however, then made. Subsequently, in 1857, the legislature made fundamental changes in the organization of the company, dividing it substantially into three companies, with a distinct governing body for each, and with three classes of stockholders. It was after this that the county subscription was made, and made not for the stock of the Mississippi & Wabash Railroad Company, but for the stock of one of the divisions. Necessarily, therefore, we held that there was no authority to make the subscription which was made; that it had not been approved by a popular vote, and hence that the bonds issued in payment for it were invalid. The county had entered into no contract until after the radical changes had been made in the organization of the company. It never assented to such a change, and when the proposed subscription was approved by the popular vote, there was no reason to expect the change afterwards made. There was at that time nothing in the general law of the State, and nothing in the charter which authorized the company to change its organization, or which looked to its division into several distinct corporations. It needs nothing more to show how unlike that case was to the present.

In the case in hand the county had, under lawful authority, undertaken

to subscribe for stock before the consolidation was made, and the undertaking had been accepted. A liability had been incurred, and the business agents of the county, to whom exclusively the law intrusted the management of its affairs, consented to and promoted the consolidation. And the subscription was made in full view of the law that allowed an amalgamation with another company. The contract was made with reference to that law. Nothing has taken place which the county was not bound to anticipate as likely to happen, and to which the people in voting for the subscription, and the board of supervisors in directing it, must not be considered as having consented. What was ruled in *Marsh* v. *Fulton County*, therefore, does not touch this case. Nor was there anything decided in *Clearwater* v. *Meredith*, 1 Wall. 25, which sustains in any degree the defence set up on behalf of the defendants.

We have, then, in brief, this case: The people of Putnam County, in pursuance of law, voted a county subscription for stock in a railroad company, to be paid for with county bonds. The financial agents of the county agreed to make the subscription, and the company accepted it. The bonds were made payable to the company, or bearer, but before they were delivered, the company became consolidated with another, in pursuance of authority conferred by the law in force when the subscription was voted, and at the instance of the board of supervisors of the county. All the conditions precedent to the delivery of the bonds were complied with to the satisfaction of the county agents, certificates for the stock were received, and the bonds were delivered and sold. The plaintiff is a *bonâ fide* holder of some of the coupons for value paid. It would, we think, be a reproach to the administration of justice if he cannot enforce the payment of those coupons, and we see no principle of law or equity that stands in the way of his action. He found the bonds and the coupons upon the market, payable to the Kankakee & Illinois River Railroad Company, or bearer. Proposing to buy, he had only to inquire whether the county was, by law, authorized to issue them, and whether their issue had been approved by a popular vote. He was not bound to inquire farther, and had he inquired he would have found full authority for the issue, and if he had also known of the consolidation it would not have affected him.

The judgment of the circuit court is reversed, and the cause is remitted, with instructions to overrule the defendant's demurrer.

CIRCUIT COURT OF THE UNITED STATES. — DISTRICT OF MASSACHUSETTS.

[FEBRUARY, 1874.]

PATENT. — LICENSEE. — CONTRACT. — JURISDICTION OF U. S. COURTS.

HILL v. *WHITCOMB.*

Notwithstanding that an action at law will lie for the infringement of a patent, proceedings in equity may usually be maintained where more practical and efficient to the ends of justice.

A suit for infringement of a patent cannot be maintained by a party who owns the exclusive right to use the invention within a specified territory, but not the exclusive right to manufacture it therein. Such a party is merely a licensee.

Where it appeared that defendants had entered into a contract with complainants whereby complainants acquired the exclusive right to use and vend the invention within a particular territory, the enjoyment of which exclusive right defendants guaranteed, and after the execution of the contract, defendants assigned to a third party the unrestricted right to use and vend the invention without excepting the territory assigned to complainants, upon a bill for injunction and account it was held: that the complainants were only licensees, and could not, therefore, maintain a suit for infringement; and that as there was no question arising under the statutes relating to patents, and both parties were residents of the same state, the court was without jurisdiction.

SHEPLEY, J. The Allen Manufacturing Company, being the owners of the rights secured by three different letters patent of the United States, for the inventions of Edwin Allen in improvements in printing-presses, on the 1st of February, 1871, entered into a certain contract with the complainants. This bill is brought to enforce the rights of the complainants under that contract.

The contract begins with a recital that the Allen Manufacturing Company are the owners of a patent automatic envelope printing-press. In fact they were then manufacturing a printing-press which they styled a patented automatic envelope printing-press, in the organization of which were included the inventions secured by the three patents above mentioned; "the exclusive right to use and vend said presses in the county of Worcester and in the State of Rhode Island" is granted to Hill, Devoe & Co., the complainants, the Allen Manufacturing Company reserving for themselves "the exclusive right to manufacture said presses."

The second clause in the contract provides that the company shall, within a reasonable time, supply all presses ordered by complainants in writing, and also that such presses shall be in all respects complete and perfect, and provided with all the improvements then in use with said presses, and owned or under the control of the party of the first part; and said parties of the second part, the complainants, "shall have the exclusive right to said improvements in the territory aforesaid under the terms of this agreement." The third clause is a covenant to protect and defend the complainants in the exclusive use and enjoyment of the said

automatic envelope printing-presses in the territory aforesaid, and of the improvements aforesaid, and to protect them against all claims and demands of all persons for infringement or damage therefor.

The fourth clause provides for the payment by complainants of the sum of one thousand dollars for each press ordered and received by them, and of a royalty of one dollar per day on each press on which envelopes can be printed of size No. 6, and corresponding royalties for other sizes "when said parties of the second part shall be protected in the exclusive use and enjoyment of them according to this agreement,"

The fifth clause contains provisions concerning the sale by complainants to other parties, not material to the subject matter of this inquiry. It is provided in the sixth clause that complainants shall have the exclusive right in said territory to use any and all improvements upon said presses, which shall hereafter be made, and which shall be owned by or under the control of said parties of the first part, and shall have the right to adapt said improvements to all presses purchased by them before the date of said improvements. The complainants were, therefore, not grantees of an exclusive right under the patents, or any of them, to the whole or any specified part of the United States. They were licensees, with the right of using and vending to others to be used, within the specified territory, such presses embodying the patented inventions as they might purchase of the Allen Company, which owned the patents, and having coupled with that license a grant of the exclusive right to use, rent, and vend said presses in the specified territory upon the prescribed conditions, and a covenant for protection in "the exclusive use and enjoyment of said automatic printing-presses aforesaid and of the improvements aforesaid."

Such a contract clearly gives the licensee no right of action for an infringement of the patent. To enable the purchaser to sue, the assignment must undoubtedly convey to him the entire and unqualified monopoly which the patentee held in the territory specified, excluding the patentee himself as well as others. Any assignment short of this is a mere license, and the legal right in the monopoly remains in the patentee, and he alone can maintain an action against a third party who commits an infringement upon it. *Gayler* v. *Wilder*, 10 How. 477; *Sanford* v. *Messer*, 2 Official Gazette, 470.

After the first day of February, 1871, the date of the contract, the Allen Manufacturing Company at Norwich, in the State of Connecticut, sold to G. Henry Whitcomb and David Whitcomb, the other respondents, a certain printing-press manufactured by the company, of a style known to them as a job-press, being a press of different style from the one in use by complainants, but containing the inventions covered by the three letters patent before mentioned, and the Whitcombs used this job-press from time to time in their business at Worcester. There is evidence in the case tending to show such notice of the contract between the Allen Manufacturing Company and Hill, Devoe & Co., the complainants, as would, according to the rules established in courts of equity, put them upon inquiry and charge them with knowledge of all the facts to which such inquiry would lead. Complainants bring this bill against the Whitcombs and the Allen Manufacturing Company for the use of said press,

charging it to be without their consent, and in violation of the orators' rights and privileges under said letters patent, and the exclusive right and privilege granted to them, and as an infringement upon the exclusive rights and privileges of the complainants under the three letters patent aforesaid. All of the defendants strenuously insist that the sale of the job-press to the Whitcombs to be used in Worcester was not in violation of the exclusive rights and privileges granted to the complainants, by reason of the differences in the construction and operation of the job-press, as compared with the automatic envelope-press. I am, however, of opinion that, inasmuch as the job-press embodied in its organization the three inventions secured by letters patent, and embodied in the organization of the press described in the contract, the sale of that press to be used in Worcester was a violation of the agreement of the Allen Manufacturing Company to protect the complainants in the exclusive use of the patented improvements in that territory. I am also of opinion, as before stated, that the Whitcombs in a court of equity would be charged, upon the evidence in this record, with notice of the equities of the complainants. The complainants contend that the Allen Manufacturing Company have substantially agreed with the complainants that they would not sell the patented inventions to be used within the limits specified in the contract; that they were limited by the contract not to dispose of machines containing the patented inventions with an unrestricted right of use, but that the right of user should have been, by the conditions of the sale, restricted to territory outside of that territory within which they had covenanted to protect the complainants in the exclusive use. They claim that the company (respondents) sold without such restriction, and the Whitcombs (respondents) bought with notice of such contract relations subsisting between the company and the complainants. They claim, therefore, that a court of equity will treat that as having been done which ought to have been done by the parties, and protect the complainants in their right to the exclusive use within the described limits. This presents the question of the jurisdiction of this court. Objection is made to the equity jurisdiction, upon the ground that the complainants have a plain, adequate, and sufficient remedy at law, by an action for breach of the covenants and agreements in the contract; but this objection would not avail if this court had jurisdiction, by reason of the residence of the parties, for the reason that the remedy at law, in a case like this, would not be as practical and efficient to the ends of justice and its prompt administration as the equitable remedy. *Wylie* v. *Coxe*, 15 How. 415; *Garrison* v. *The Memphis Insurance Company*, 19 How. 312. Another objection is that the bill in this case does not set out, as a claim for equitable relief, supposed equities springing from a violation of the contract and notice to the Whitcombs, but is a bill for injunction and account, on the ground of alleged infringement of the exclusive rights of the complainants under the several patents set out in the bill. This objection is well taken. The bill cannot be sustained as a bill for infringement of rights under letters patent. The complainants are licensees only, and as such cannot maintain an action for infringement in their own name. The respondents are not infringers of any rights under letters patent. The Allen Manufacturing Company were the owners by assignment of the letters patent,

and sole owners for the United States. They cannot, therefore, be infringers. The other respondents, the Whitcombs, bought their press of the company, which had the power to convey to them a machine, with the right to use it anywhere in the territory owned by the grantors, which embraced the whole United States. They are not infringers under the patent law. The mere fact that the patentees, in violation of a covenant which they had made with other parties not to do so, had conveyed to them the unrestricted right to use the patented inventions, did not make them infringers of any rights under the letters patent. For these reasons the bill, in its present form, cannot be maintained. Inasmuch, however, as that objection might be obviated by an amendment of the bill, setting out the grounds of equitable relief upon which the complainants rely, I think it better not to rest the decision upon any technical grounds as to the form of the bill and the grounds of equitable relief set up in the record, but to consider the case as if the grounds relied upon were well charged in the pleadings. The question then presented would be — when the patentee or his assignee of letters patent for an invention sells to a person a machine embodying the patented invention, with a covenant that the vendee and licensee shall be the exclusive licensee, and have the sole right to use the patented invention within a described territory, and thereafter sells to another the patented invention in violation of his contract, to be used in the described territory, such second vendee having notice of the first contract, — Can the licensee enforce his rights by bill in equity in the federal courts without regard to the citizenship of the parties, under the jurisdiction conferred upon those courts by the patent act? The fifty-fifth section of the act of July 8, 1870, enacts "that all actions, suits, controversies, and cases arising under the patent laws of the United States shall be originally cognizable as well in equity as at law by the circuit courts of the United States;" . . . . "and the court shall have power upon bill in equity filed by any party aggrieved to grant injunctions according to the course and principles of courts of equity to prevent the violation of any right secured by patent on such terms as the court may deem reasonable." Is the case supposed a case or controversy arising under the patent laws of the United States? I feel compelled to come to the conclusion that it is not. It is a case arising under a contract in relation to a machine embodying in its organization three or more patented inventions. But it is a case arising out of the contract, and the relations of the parties under that contract, and not under the patent laws of the United States. If the Allen Manufacturing Company were the sole manufacturers of a certain description of printing-presses not patented, and should sell one of such presses to the complainants, with a covenant that they would not sell any like press to any other person to be used in the same territory to compete with them, and afterward should sell to another person who had notice of the contract a like printing-press, to be used in the same territory in competition with the first vendees, it would present a case furnishing precisely the same ground for equitable jurisdiction as that claimed to exist in the present case. It would present a case cognizable in a court of equity in the state of which the parties were citizens, if the court should be of opinion that there was not a full, adequate, and complete remedy at law. It would, in my opinion, present

a case for equitable relief in this court, if, by reason of the parties being citizens of different states, this court had jurisdiction of the case. But it would not be and this case is not a bill to prevent "the violation of a right secured by patent," but of a right secured by contract. The machine purchased by the Whitcombs of the patentees had passed out of the monopoly and from under the protection of the patent laws of the United States, and was like other property subject only to the operation of the laws of the State. *Goodyear* v. *Beverly Rubber Company*, 1 Cliff. 368; *Adams* v. *Burke*, 1 Official Gazette, 282; *Hawley* v. *Mitchell*, 4 Fish. 388; *S. C.* 1 Official Gazette, 306; *Bloomer* v. *McQuewan et al.* 14 How. 539; *Wilson* v. *Rousseau*, 4 How. 646; *Metropolitan Washing Machine Company* v. *Earle*, 2 Fish. 203. In a court of general equity jurisdiction the fact that the patentee had, in fraud of his contract, conveyed such a right to use the machine in the city of Worcester to one who had notice of the contract would furnish a ground for equitable relief, for the very reason that thereby the purchaser had acquired the right to use the machine without violation of the patent laws, when the patentee had stipulated that no one but the first licensee should be able to do so without being liable as an infringer. The case is like that cited by complainant's counsel of *Taylor* v. *Stibbert*, 2 Vesey, Jr. 439, where the vendor of real estate was bound to grant a lease or answer in damages for non-performance. The purchaser bought with notice of the contract, and the court held that he must fulfil it. The equitable jurisdiction springs in that case from the breach of the contract, the notice of it to the vendee, and the want of an adequate legal remedy. Admitting that all these elements exist in the present case, they do not confer jurisdiction in this case over these parties, for these facts alone do not bring the case within any grant in the Constitution to Congress of judicial power, or of any act of Congress conferring such power on the federal courts.

Bill dismissed.

SUPREME COURT OF ILLINOIS.

[JANUARY, 1874.]

CHECK. — PROMISSORY NOTE DISCOUNTED BY BANK. — EQUITABLE SET-OFF.

FOURTH NATIONAL BANK OF CHICAGO v. *CITY NATIONAL BANK OF GRAND RAPIDS.*

Complainants, a bank, discounted a note the amount of which was placed to A's credit. Prior to the maturity of the note A drew his check on complainants for an amount less than had been credited to his account, which check was purchased by defendants, and upon being presented payment thereof was refused. Defendants having brought an action at law upon the check, complainants filed their bill for an injunction to restrain the same. Held, that there could be no injunction; that the check was in effect an assignment of the amount necessary to pay it, and that no right of equitable set-off existed in respect of the note, as against the holders of the check.

BREESE, C. J. This was a bill in chancery by appellants to enjoin a suit at law, brought by the appellees against appellants to recover the proceeds of a check, drawn by one Latourette, on appellants, and for which appellees had paid the money, and thereby became owners of it in due course of business, and for value.

Appellants own a banking institution in Chicago, and appellees in the city of Grand Rapids, in the State of Michigan.

Latourette was a resident of the last named city, and had, on the 25th of September, 1871, obtained a discount of appellants, on his note for five thousand dollars, and which sum was duly placed to his credit on their books.

On the 6th of October thereafter, Latourette drew his check against a portion of these funds, for one thousand dollars, in favor of appellees, who, on the same day, paid the cash for it, taking it in the usual course of business. The check was sent immediately to Chicago for collection, but it did not reach there in time to be presented for payment on the next day, which was Saturday. On the following day, Sunday, the memorable fire occurred, preventing banks from doing business until the 17th day of October, on which day the check was duly presented and payment refused.

Appellees brought assumpsit in the circuit court to recover the amount of the check, which is the suit sought to be enjoined.

The prayer of the bill is, not only that appellees be enjoined from prosecuting the suit, but that complainants may be decreed, as against appellees, to have a first and valid lien on Latourette's deposit to secure the payment of his note. It was also alleged that Latourette had gone into bankruptcy on or about the 8th of November, 1871, on a petition filed on October 13th, and an assignee appointed, to whom was assigned all the estate of the bankrupt.

The object of the bill is, to ascertain and settle the rights of the appellants as against the appellees, the holder of the check, and the assignee in bankruptcy.

A demurrer was interposed, on which the court gave judgment for the defendant and ordered a decree dismissing the bill. To reverse this decree an appeal was taken to this court.

The note discounted by appellants was not due — three days' grace being allowed — until the 28th day of October.

The check was presented for payment on the 17th day of October, on which day there were funds, belonging to the drawer of the check, in the bank sufficient to pay it.

On the authority of *Munn et al.* v. *Burch et al.* 25 Ill. 35, we must hold the holder of the check, who had paid value for it, was entitled to so much of this fund as the check called for, and when presented to appellants, they became the holder of the money to the use of appellees, and were bound to account to them for that amount, unless other equities have intervened.

It is claimed by appellants they have equities superior to those of appellees, and of such a nature as to override the legal claim of appellees.

Those equities are based: 1. Upon an alleged lien on the funds of its depositors to secure their indebtedness, whether matured or not. 2. In a

case of insolvency of a depositor, a right to an equitable set-off exists in favor of the bank, and this without regard to the maturity of the debt; and they further urge, that the assignee in bankruptcy of the drawer of the check has a claim upon this fund as against the check holder and appellants, and appellants may be subjected to another suit. As to the first proposition, that is answered by the case cited. It was there said the check operated as an equitable if not a legal assignment and transfer of this money from the depositor to the holder of this check, as the drawer had in the bank at the time it was presented for payment, subject to his draft, an amount sufficient to pay it. The rights of the parties were then fixed, and appellants had no right, subsequently, to pay other checks or other demands, either to themselves or to others, which were afterward presented or accrued. If they could not retain this money to pay a debt, which, after the presentation of the check, had accrued to themselves, it is very clear they could not retain it under the claim of a lien for a debt not due. Such a claim would be destructive of the very purpose of a bank accommodation such as this was. If a bank can retain the money, as against the note, of what use to a borrower is the discount? The universal custom informs us what the contract of all the parties to such transactions is. It informs us that the banker, when he receives the deposits, agrees with the depositor to pay it out, on the presentation of his check, in such sums as those checks may specify, and to the persons presenting them; and with the whole world the banker agrees that whosoever shall become the owner of such check shall, upon presentation thereof, become thereby the owner and entitled to receive the amount specified in the check, provided the drawer shall, at that time, have that amount on deposit.

It was further said, in the case cited, to deny to the holder of a bank check both a legal and equitable right, after presentation of the check, to the money of the drawer in the hands of the banker, would destroy the most valuable feature of bank deposits and checks. In the very nature of such transactions a banker's lien cannot extend to the money left on deposit with him according to the customs and usages of banks. It has never been so extended, but is confined to sureties and valuables which may be in the banker's custody as collaterals. The credit must be given on the credit of the sureties or valuables either in possession or expectancy. *Russell* v. *Hadduck*, 3 Gilm. 233. This is the extent of a banker's lien.

The other proposition, that of a right to an equitable set-off, this right might be conceded if no third party was in the way. The third party here is the appellees, whose right to this money was fixed on the 17th day of October, the day the check was presented and payment demanded. This right of set-off, as claimed, is but another phase of the banker's lien, and has no foundation in law or justice as against a check holder for value.

The remaining proposition is readily disposed of when it is considered that the title of the assignee of property of the bankrupt is subject to all the rights and equities which would have affected such property while in the hands of the bankrupt before the adjudication in bankruptcy. The right of appellees had become fixed, and their equity was complete before the petition in bankruptcy was filed.

It cannot be seriously claimed by appellants that a recovery by appellees in their action at law, on this check, would not be a defence to an action brought by the assignee.

We do not perceive any ground, legal or equitable, on which the claim of appellants is based. If their first two propositions were sound, a most important part of the system of banking would become worthless.

The decree of the circuit court is affirmed.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1873.]

REMOVAL OF CAUSES.

GROVER & BAKER SEWING-MACHINE CO. et al. v. *FLORENCE SEWING-MACHINE CO.*

1. *Original cognizance of all suits of a civil nature, at common law or in equity, is vested in the circuit courts by the eleventh section of the judiciary act, concurrent with the courts of the several states, subject to certain limitations, conditions, and restrictions.*
2. *Those conditions, applicable to the present case, are, that the matter in dispute shall exceed, exclusive of costs, the sum or value of five hundred dollars, and that an alien is a party, or that the suit is between a citizen of the state where the suit is brought and a citizen of another state.*
3. *Where the matter in dispute does not exceed, exclusive of costs, the sum or value of five hundred dollars, the circuit courts have no jurisdiction, except in revenue and patent cases, and the restriction applicable to all cases is, that no civil suit shall be brought before any circuit court against any inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ.*
4. *Suits, whether at law or in equity, when commenced in a state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, may, under the twelfth section of the same act, be removed by the defendant for trial into the next circuit court for the same district, provided the defendant file a petition requesting such removal at the time of entering his appearance in the state court, and comply with all the other conditions specified in the section.*
5. *By the true construction of that section it is required, in order that the right to effect the removal may arise, that each distinct interest should be represented by persons, all of whom are entitled to sue, or such as may be sued in the federal courts; the established rule being, that where the interest is joint each of the persons concerned in that interest must be competent to sue or be liable to be sued in the court to which the suit is removed.*
6. *Circuit courts do not derive their judicial powers immediately from the Constitution; consequently the jurisdiction of such courts in every case must depend upon some act of Congress, as the Constitution provides that the judicial powers of the United States shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish.*

7. *Courts created by statute can have no jurisdiction in controversies between party and party except such as the statute confers.*
8. *Different regulations are enacted in the subsequent act for the removal of causes in certain cases from the state courts, but this act, like the judiciary act, limits the right of removal to the alien defendant and to the defendant who is a citizen of a state other than that in which the suit is brought.*
9. *None but the alien defendant or the non-resident defendant have any right under that act to petition for the removal of the case, but the provision is that such a defendant may at any time before the final hearing of the cause remove the same from the state court into the circuit court for trial, subject to the conditions therein expressed, even though it appears that a citizen of the state where the suit is brought is also a defendant; if* (1) *the suit, so far as it relates to the alien defendant or the non-resident defendant, was instituted and is prosecuted for the purpose of restraining or enjoining such defendant; or* (2) *if the suit is one which, so far as it respects such alien or non-resident defendant, can be finally determined without the presence of the other defendant or defendants as parties in the cause.*
10. *Cases can only be removed under that act, however, subject to the fundamental condition that the removal of the cause shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the state court, if he shall see fit, against the other defendants.*
11. *Nothing can be inferred from that act to support the theory assumed by the defendants, as the material phrase of the act is the same as the language employed in the judiciary act, and the construction must be controlled by the rule that words and phrases, the meaning of which have been ascertained by judicial interpretation, are, when used in a subsequent statute, to be understood in the same sense.*
12. *Congress amended that act on the 2d of March,* 1867, *and extended the right of removal in such a case to the citizen of another state, whether he be plaintiff or defendant, in a suit commenced or pending in a state court, in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state.*
13. *Aliens are not included in the new enactment at all, and the conditions applicable to the non-resident party, whether plaintiff or defendant, are, that the petitioner must file in the state court an affidavit, stating that he has reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in such state court; and the act provides that if he will file such affidavit and comply with all the other specified conditions, he may, at any time before the final hearing or trial of the suit, apply to the state court for the removal of the suit into the next circuit court to be held in the district, and that it shall be the duty of the state court to proceed no further in the suit.*
14. *Appropriate language to show that the law makers intended to vest in the non-resident party, whether plaintiff or defendant, the right to remove the suit into the circuit court in a case where a citizen of the state in which the suit is brought is joined in the suit with the petitioner, is wholly wanting, nor is it competent for the court to supply the deficiency by construction, as it is obviously the main purpose of the act to extend the right of removal to the non-resident plaintiff as well as to the non-resident defendant.*
15. *Words to express any such purpose are entirely wanting, the language employed being that a pending suit, or one hereafter brought, in a state court "in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state," . . . . whether he be plaintiff or defendant, "such citizen of another state" may remove the same into the circuit court.*
16. *Instead of that the language of the judiciary act is, if a suit is commenced in a state court "by a citizen of the state in which the suit is brought against a citizen of another state," the defendant may remove the suit into the circuit court if he file his petition at the time he enters his appearance in the state court.*

17. *Beyond doubt the phraseology of the two provisions is different, but they mean the same thing in respect to the party who may effect the removal, except that the last act extends the privilege to the non-resident plaintiff as well as to the non-resident defendant; but all of the plaintiffs or all of the defendants, as the case may be, must be non-residents and must join in the petition for the removal of the suit.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Original cognizance of all suits of a civil nature, at common law or in equity, is given to the circuit courts by the eleventh section of the judiciary act, concurrent with the courts of the several states, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, ... and an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state, subject, however, to the restriction that no civil suit shall be brought before any circuit court against any inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. 1 Stat. at Large, 78.

Suits commenced in a state court against an alien, or by a citizen of the state in which the suit is brought, against a citizen of another state, may, under the twelfth section of the same act, be removed for trial by the defendant into the circuit court for the same district if the matter in dispute exceeds the sum or value of five hundred dollars, provided the defendant file a petition requesting such removal at the time of entering his appearance in the state court, and offer good and sufficient surety that he will enter copies of the process against him in such circuit court on the first day of its next session, and for his appearance, and that he will give special bail in the case if such bail would be requisite in the state court. Ibid. 79.

Jurisdiction in such a case is concurrent between the proper state court and the circuit court for the same district, and the provision is that such a suit, if commenced in the state court, may be removed by the defendant for trial into the circuit court, subject to the conditions before mentioned, the privilege being given to the defendant only, as the plaintiff, when he institutes his suit, may elect in which of the two concurrent jurisdictions he prefers to go to trial.

These expressions in the act of Congress, where an alien is a party or the suit is between a citizen of a state where the suit is brought and a citizen of another state, says Marshall, Ch. J., the court understands to mean that each distinct interest should be represented by persons all of whom are entitled to sue or may be sued in the federal courts; or, in other words, that where the interest is joint each of the persons concerned in that interest must be competent to sue or be liable to be sued in the court to which the suit is removed. *Strawbridge et al.* v. *Curtiss et al.* 3 Cr. 267; *Conolly* v. *Taylor*, 2 Pet. 564; Curtis Com. sec. 75.

All of the complainants in that case were citizens of Massachusetts, and so also were all of the respondents, except one, who, it was admitted, was a citizen of Vermont. Due service was made upon the resident respondents, and the record showed that the subpœna had also been served upon the other respondent in the state where he resided. Want of jurisdiction was set up by the respondents in the circuit court, and the judge presid-

ing in the circuit court entered a decree dismissing the bill of complaint. Appeal was taken to the supreme court, and the supreme court unanimously affirmed the decree of the circuit court.

Repeated decisions have since been made by this court and by many other courts, state and federal, to the same effect. Prior to the case of *Railroad Co.* v. *Letson*, 2 How. 550, it had frequently been held by this court that a corporation aggregate, as such, was not properly included in the word citizen, as used in the judiciary act, and consequently that such a corporation, if regarded merely as an artificial being, could not sue in the federal courts; yet the court decided, in several cases, that the court would look beyond the corporate character of such an artificial being to the individuals of whom it was composed, and if it appeared that they were citizens of a different state from the party sued, that the suit, whether an action at law or a suit in equity, could be maintained in the proper circuit court.

Cases of that description are quite numerous, and yet in all of them it was held by this court that all of the corporators must be citizens of a different state from the party sued, else the jurisdiction could not be sustained. *Bank of U. S.* v. *Deveaux*, 5 Cr. 61; *Commercial & Railroad Bank* v. *Slocomb*, 14 Pet. 63; *Irvine* v. *Lowry*, 14 Pet. 299; *Breithaupt* v. *Bank*, 1 Pet. 238; *West* v. *Aurora City*, 6 Wall. 142.

Corporations, it is true, are now regarded by this court as inhabitants of the state by which they are created and in which they transact their corporate business, and it is also held that a corporation is capable of being treated as a citizen for all purposes of suing and being sued in a circuit court, but the rule as modified, in that regard, does not diminish the authority of those cases as precedents to show that by the true construction of the judiciary act it requires that each of the plaintiffs, if the interest be joint, must be competent to sue each of the defendants in the circuit court to sustain the jurisdiction under the eleventh section of that act. *Marshall* v. *Railroad Co.* 16 How. 325; *Railroad Co.* v. *Wheeler*, 1 Black, 295; *Drawbridge Co.* v. *Shepherd*, 20 How. 227; *S. C.* 21 How. 112; *Coal Co.* v. *Blatchford*, 11 Wall. 172.

Certain sums of money, it is alleged, in excess of what could properly be exacted by the defendant corporations, had been paid to those corporations by the plaintiffs, and the corporation defendants refusing to refund the amount of such alleged excess the corporation plaintiffs instituted an action at law, in the supreme judicial court of the state, against the corporation defendants, to recover back the amount of the alleged overpayments.

Patent rights, it seems, are owned by the three corporation defendants, for the exclusive privilege to construct, use, and vend certain patented sewing-machines, and the inference is that the corporation plaintiffs are or have been licensees of the corporation defendants. What the precise terms of the license are or were does not very satisfactorily appear, but it may be inferred that the plaintiffs covenanted to pay to the defendants a certain patent rent or tariff for the use of the patent right, subject to be reduced in amount in case the defendants granted licenses to other parties at a lower rate, and the charge is that the defendants did grant licenses to others at a lower rate without making to the plaintiffs the stipulated re-

duction; that the corporation defendants have ever since exacted the higher patent fee or tariff in violation of the terms of the license.

Payments having been made the plaintiffs commenced this suit to recover back the amount. They joined as defendants the Grover & Baker Sewing-machine Company, which is a corporation established under the laws of Massachusetts; the Wheeler & Wilson Manufacturing Company, which is a corporation established under the laws of Connecticut; and the Singer Manufacturing Company, which is a corporation established under the laws of New York. Seasonable appearance was entered by the company first named at the return term, and they filed an answer within the time required by the rules of the court. Neither of the other corporations defendant entered a general appearance at the return term, but the plaintiffs caused an order of notice to issue to those corporations respectively to appear at the next term of the court, and subsequently filed proof that the order of notice was duly served by publication.

By the return of the marshal it appears that personal property of those respective corporations was attached on the original process, and the plaintiffs claim that by virtue of the attachment and the due service of the order of notice the state court acquired jurisdiction of all the parties. Subsequently, however, both of the non-resident corporations appeared, and, having obtained the leave of the court for the purpose, filed their answers to the action, and on the same day they filed their several petitions for the removal of the cause for trial to the circuit court for that district. Each of the petitions was accompanied by an affidavit executed by the president of the company, and by a bond of the company in usual form as required by law in such a case. Hearing was had and the state court refused to grant the prayer of the respective petitions, and directed that the parties should proceed to trial, to which rulings the defendants then and there excepted and the verdict and judgment were for the plaintiffs.

Exceptions were also taken by the defendants to the rulings of the court in the progress of the trial and to certain instructions given by the court to the jury, but it will not be necessary to reëxamine the exceptions taken during the trial, as the only question to be determined under this writ of error is whether the rulings of the court in overruling the respective petitions for the removal of the cause into the circuit court, and in directing that the parties should proceed to trial in the state court, were or were not correct.

Circuit courts do not derive their judicial power, immediately, from the Constitution, as appears with sufficient explicitness from the Constitution itself, as the first section of the third article provides that "the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish." Consequently the jurisdiction of the circuit court in every case must depend upon some act of Congress, as it is clear that Congress, inasmuch as it possesses the power to ordain and establish all courts inferior to the supreme court, may also define their jurisdiction. Courts created by statute can have no jurisdiction in controversies between party and party but such as the statute confers. *Turner* v. *Bank of North America*, 4 Dall. 10; *Sheldon* v. *Sill*, 8 How. 448; *McIntire* v. *Wood*, 7 Cr. 506; *Kendall* v. *U. S.* 12 Pet. 616.

Congress, it may be conceded, may confer such jurisdiction upon the circuit courts as it may see fit, within the scope of the judicial power of the Constitution, not vested in the supreme court; but as such tribunals are neither created by the Constitution nor is their jurisdiction defined by that instrument, it follows that inasmuch as they are created by an act of Congress it is necessary, in every attempt to define their power, to look to that source as the means of accomplishing that end. *Cary* v. *Curtis*, 3 How. 345.

Federal judicial power, beyond all doubt, has its *origin* in the Constitution; but the organization of the system and the distribution of the subjects of jurisdiction among such inferior courts as Congress may from time to time ordain and establish, within the scope of the judicial power, always have been, and of right must be, the work of the Congress.

Attempt is made in argument to maintain the right, claimed by the defendants, to remove the cause for trial in this case from the state court where it was commenced into the circuit court, as being derived under the act of the 2d of March, 1867, which is entitled an act to amend a prior act, entitled an act for the removal of causes, in certain cases, from state courts.

Reference will first be made to the prior act referred to in the title of the amendatory act, as the prior act followed the judiciary act in many respects, and, like that act, limits the right of removal to the alien defendant and the defendant who is a citizen of a state other than that in which the suit is brought. Subsequent to those preliminary recitals it provides, in effect, that where the suit is commenced in the state court against an alien or by a citizen of the state against a citizen of another state, the non-resident defendant, or the alien defendant, as the case may be, may remove the cause from the state court into the circuit court, even though it appears that a citizen of the state where the suit is brought is also a defendant, if the suit, so far as it relates to the alien defendant or the non-resident defendant, was instituted and is prosecuted for the purpose of restraining or enjoining such defendant; or if the suit is one which, so far as it respects such alien or non-resident defendant, can be finally determined without the presence of the other defendant or defendants as parties in the cause, then and in every such case the alien or non-resident defendant may, at any time before the trial or final hearing of the cause, file a petition for the removal of the same, as against the petitioner, into the circuit court; but the provision in the same act also is, that such removal of the cause shall not be deemed to prejudice or take away the right of the plaintiff to proceed, at the same time, with the suit in the state court, if he shall see fit, against the other defendants. 14 Stat. at Large, 306.

Remarks to show that the act referred to contains nothing to support the view that Congress intended by it to depart from the essential principle embodied in the judiciary act are hardly necessary, as it is obvious that the language of the act does not empower any defendant, unless he be an alien or non-resident, to remove the cause or to elect any other forum for the trial of the same than the one to which the suit is returnable, nor does it give any sanction whatever to the proposition that the resident defendant shall be compelled or permitted under any circumstances to go elsewhere to answer the suit. Defendants in certain cases may

sever, after final judgment, for the purpose of prosecuting an appeal or writ of error, which is effected by a proceeding usually called summons and severance, which will enable one of several defendants, or any number less than the whole, to sue out a writ of error or take an appeal in a case where the other defendants or respondents refuse to join in the petition for the same. *Williams* v. *Bank*, 11 Wheat. 414; *Wilson's Heirs* v. *Ins. Co.* 12 Pet. 140; *Todd* v. *Daniels*, 16 Pet. 521.

Modes of effecting a severance among executors, so that less than the whole number may sue, were also known at common law, but in such a case it was necessary that such a proceeding should be perfected before the suit was instituted. 2 Wms. Exr's, 4th Am. ed. 1186, note *t*; *Goodyear* v. *Rubber Co.* 2 Cliff. 368.

By virtue of the provision under consideration the alien defendant, or the defendant who is a citizen of a state other than that in which the suit is brought, is empowered, subject to the conditions specified, without any summons and severance, to remove the cause, as between him and the plaintiff, into the circuit court for trial, leaving the cause, as between the plaintiff and the other defendants, to proceed in the state court where the suit was commenced, wholly unaffected by such removal, the only effect of the removal in such a case being to sever to that extent the defendants in the cause for the special purpose provided in the enactment, but the provision affords no support whatever to the theory set up by the defendants in the case before the court. *Smith* v. *Rines*, 2 Sum. 338; *Ward* v. *Arredondo*, 1 Paine, 410; *Sayles* v. *Northwestern Ins. Co.* 2 Curt. 212; *Hazard* v. *Durant*, 9 R. I. 608; *Beardsley* v. *Torrey*, 4 Wash. C. C. 286.

Before the passage of that act no removal could be made in such a case, as some of the defendants are by that act supposed to be citizens of the state where the suit is brought, and all the courts, federal and state, had uniformly decided that unless the cause was removable as to all the defendants it could not be removed at all, as the act of Congress contained no provision warranting any such proceeding as summons and severance for any purpose. *Moffat* v. *Soley*, 2 Paine, 103; *Bissel* v. *Horton*, 3 Day, 281; *Tuckerman* v. *Bigelow*, 21 Law Rep. 208; *Herndon* v. *Ridgway*, 17 How. 424; *Railway Co.* v. *Whitton*, 13 Wall. 289.

Unlike the judiciary act, however, the alien defendant or the defendant who is a citizen of a state other than that in which the suit is brought may, under the "act for the removal of causes in certain cases from state courts," have the cause removed, as to himself, subject to the condition that such severance or partial removal shall not prejudice or take away the right of the plaintiff to proceed, at the same time, with the suit in the state court as against the other defendants, showing that the right of removal is still confined to the alien and non-resident defendant, and that no removal of the cause as to any other defendant can be made under that enactment.

Grant all that, still it is insisted by the defendants that the rulings of the state court in refusing to grant the prayers of their petitions and in directing that the parties should proceed to trial was erroneous, as the petitions were filed under the later act of Congress, which, as they contend, very much enlarges the right to remove causes from the state courts into the circuit courts for trial.

Important changes undoubtedly are made by that act in the law upon that subject, as it clearly extends the privilege to a non-resident plaintiff as well as to a non-resident defendant, subjecting both, however, to a new condition, wholly unknown in the prior acts of Congress, vesting such a right in an alien defendant or in a defendant who was a citizen of a state other than that in which the suit is brought. Where a suit is now pending or may hereafter be brought in any state court, in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state, such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state court an affidavit stating that he has reason to believe and does believe that, from prejudice or other local influence, he will not be able to obtain justice in such state court, may, at any time before the final hearing or trial of the suit, file a petition in such state court for the removal of the suit into the next circuit court to be held in the district where the suit is pending.

Aliens it will be seen are not included in the provision, but the right to petition for the removal is extended to the non-resident plaintiff as well as to the non-resident defendant, in a case where it appears that a resident defendant is sued by a non-resident plaintiff, as in such a case there is controversy between a citizen of the state in which the suit is brought and a citizen of another state, just as much as there is in a case where a resident plaintiff sues a non-resident defendant in his own district, the defendant being found within the same district and served there with the original process.

Under the judiciary act and the succeeding act for the removal of certain causes, the plaintiff, if he elected to commence his suit in a state court, whether he was resident or non-resident, was bound by his election, nor was it ever supposed that he could subsequently be permitted to remove the cause from the state court into the circuit court in ordinary circumstances, as neither of those acts of Congress vest in the plaintiff any such right, nor do they contain any language to warrant the conclusion that Congress ever intended to confer upon a plaintiff any such power. Non-resident defendants and alien defendants might cause such removal to be made, but under the judiciary act the condition was that such a defendant must file his petition requesting such removal at the time he entered his appearance in such state court; which condition is relaxed in this act, so far as it respects non-resident defendants and non-resident plaintiffs, and it is provided that the right may be exercised "at any time before the final hearing or trial of the suit."

Viewed in the light of these suggestions, it is clear that it is a mistake to suppose that the act will operate to limit the right conferred by the judiciary act, unless the court give it the broad construction assumed by the defendants, as it extends the right to a non-resident plaintiff as well as to a non-resident defendant, and allows both to file the necessary petition at any time before the final hearing or trial of the suit, leaving the case of the alien defendant unaffected by any of its provisions.

Mere regulation, such as requiring the cause of removal to be stated, and that the petition should be supported by an affidavit, is not sufficient change in the principle of the judiciary act to support the proposition, as the great purpose of the new enactment is to extend the right to a non-

resident plaintiff as well as to a non-resident defendant, and to enlarge the time within which the petition may be filed, leaving the alien defendant wholly unaffected by the new regulations.

Apply these rules of construction to the three acts of Congress referred to in this case, and it is clear that they will work out the following results: (1) In a case where the suit is commenced by a plaintiff in the court of a state of which he is a citizen, against a defendant who is a citizen of another state, the defendant may remove the cause into the circuit court of that district for trial. (2) Where the plaintiff brings his suit in the court of a state other than that of which he is a citizen, against a defendant who is a citizen of the state where the suit is brought, the plaintiff may remove the cause into the circuit court under the last-named act. *Beery v. Irichi*, 22 Gratt. 485.

Suppose, however, the plaintiff brings his suit in the court of a state other than that of which either he or the defendant is a citizen, the defendant having been found therein and been duly served with the original process, then neither the plaintiff nor the defendant can remove the cause from the state court into the circuit court for trial under any existing act of Congress, as in that case there is not controversy between a citizen of a state in which the suit is brought and a citizen of another state, nor is the suit one commenced by a citizen of a state in which the suit is brought against a citizen of another state, as the condition is as provided in the judiciary act. Both plaintiff and defendant being non-residents, the acts of Congress make no provision for the removal of such a cause into the circuit court for trial.

Unaffected as the judiciary act is by the latest of the three acts mentioned, the law still is that if the suit is commenced against an alien in a state court, he may file a petition for the removal of the same for trial into the next circuit court to be held in the district, at the time of entering his appearance in such state court. Non-resident defendants or alien defendants may also remove certain causes from a state court into a circuit court for trial, under the intermediate act of Congress, as before explained. Where the suit is commenced in a state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, the non-resident defendant or the alien defendant, as the case may be, may remove the cause from the state court into the circuit court for trial, even though it appears that a citizen of the state where the suit is brought is also a defendant, if the suit, so far as it relates to the non-resident or alien defendant, was instituted and is prosecuted for the purpose of restraining or enjoining such defendant, or if the suit is one which, so far as it respects such defendant, can be finally determined without the presence of the other defendants as parties in the cause.

Considering the stringent conditions which are embodied in the last-named act, it is doubtful whether it will prove to be one of much practical value, but as it remains in full force it cannot be properly overlooked in this investigation.

Suggestion is made that it is a step in advance of the judiciary act, but the force of the suggestion is not perceived, as it makes no provision that any party shall go into the circuit court for trial except such as may go or be sent there under the twelfth section of the judiciary act. Divest

that act of the feature which provides for the severance of the defendants and that which empowers the plaintiff to proceed with the suit in the state court as against the other defendants, and it is exactly the same as the corresponding feature of the judiciary act, except that it extends the time for filing the petition for the removal of the cause from the time the petitioner enters his appearance in the state court to the time of the trial or final hearing of the cause.

Separately considered, the language employed in the "act for the removal of causes in certain cases from the state courts" to describe the parties and the suit in which the alien defendant or the non-resident defendant may remove the cause into the circuit court for trial, is identical with the language employed in the judiciary act, the two provisions differing only in the particulars heretofore sufficiently explained, showing that the well established rule applies in construing the later act, that words and phrases, the meaning of which in a statute have been ascertained by judicial interpretation, are, when used in a subsequent statute, to be understood in the same sense. Potter's Dwarris, 274; Bac. Ab. Statute I.; *Pennock* v. *Dialogue*, 2 Pet. 18; *Cathcart* v. *Robinson*, 5 Pet. 280; *McCool* v. *Smith*, 1 Black, 469; *Com.* v. *Hartnett*, 3 Gray, 450; *Ruckmabove* v. *Mottichund*, 32 Eng. L. & Eq. 84; *Bogardus* v. *Trinity Church*, 4 Sand. Ch. 675; *Rigg* v. *Walton*, 13 Ill. 15; *Adams* v. *Field*, 21 Vt. 256.

Such a construction in the case supposed becomes a part of the law, as it is presumed that the legislature, in passing the later law, knew what the judicial construction was which, had been given to the words, of the prior enactment. Support, therefore, to the theory put forth by the defendants cannot be derived either from the judiciary act or from the later act, entitled an act for the removal of causes in certain cases from state courts. 14 Stats. at Large, 306.

Admit that, and still it is insisted by the defendants that they had the right to remove the cause from the state court under the act to amend the act called the removal act. 14 Stats. at Large, 559.

Much stress is placed upon the particular language of that act, which is, that "when a suit is now pending or may hereafter be brought in any state court, *in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state.*" Instead of that the corresponding language of the judiciary act is, if a suit be commenced in any state court . . by a citizen of the state in which the suit is brought against a citizen of another state. Different words are certainly employed in the two provisions, but it is difficult to see in what particular the jurisdiction of the state court is lessened by the last act, or in what respect the difference of phraseology supports the theory of the defendants, as "a suit by a plaintiff against a defendant" must mean substantially the same thing in the practical sense as "a suit in which there is controversy between the parties," as each provision includes the word suit, which applies to any proceeding in a court of justice in which the plaintiff pursues his remedy to recover a right or claim. 2 Bouv. Dic. 558; *Weston* v. *City Council of Charleston*, 2 Pet. 449; 1 Curtis Com. sec. 73, p. 85; Webs. Dic., Suit.

Indubitably they differ in this, that it is the defendant only who can remove the cause under the judiciary act, but the last-named act empow-

ers the non-resident plaintiff, in a proper case, as well as the non-resident defendant, to exercise the same privilege; as in the former case, as well as in the latter, there is a suit pending in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state, and the express enactment is, that in the case supposed "such citizen of another state, whether he be plaintiff or defendant," if he will comply with the conditions stated, may, at any time before the final hearing or trial of the suit, file a petition for the removal of the cause. *Cooke* v. *State National Bank*, 1 Lansing, 502; *Bryant* v. *Rich*, 106 Mass. 191; *Cooke* v. *State National Bank*, 52 N. Y. 96.

Real parties only are empowered to claim that right under either act, and it is equally clear that the right of the defendant cannot be defeated by joining with him a mere nominal party in the action. *Dodge* v. *Perkins*, 4 Mason, 435; *Rateau* v. *Bernard*, 3 Blatch. 245; *Ward* v. *Arredondo*, 1 Paine, 410; *Wormley* v. *Wormley*, 8 Wheat. 451; 1 Curtis Com. sec. 74.

Special attention is also invited to the fact that the judicial power conferred by the Constitution extends to controversies between citizens of different states, and the proposition is submitted in argument that it would be competent for Congress to pass a law empowering one of a number of plaintiffs, or one of a number of defendants, to remove such a suit for trial from a state court into the circuit court for the same district, if it appeared that the petitioner, whether plaintiff or defendant, was a citizen of a state other than that in which the suit was brought, even though all the other plaintiffs or other defendants were citizens of the state in whose court the suit was pending; but the court is of the opinion that the question does not arise in this case, as the act of Congress in question, in the judgment of the court, does not purport to confer any such right.

Were it true that the circuit courts derive their judicial power immediately from the provisions of the Constitution, it might be necessary to examine that proposition; but inasmuch as it is settled law that the jurisdiction of such courts depends upon the acts of Congress passed for the purpose of defining their powers and prescribing their duties, it is clear that no such question can arise in a case like the present, unless it first be ascertained that Congress has passed an act purporting to confer the disputed power. Courts are disinclined to adopt a construction of an act of Congress which would extend its operation beyond what is warranted by the Constitution; but the suggestion that Congress possesses the power to confer a new privilege is not a sufficient reason to induce the court to extend an existing enactment by construction so as to embrace the privilege, unless the words of the enactment are of a character to warrant the construction.

Either the non-resident plaintiff or non-resident defendant may remove the cause under the last-named act, provided all the plaintiffs or all the defendants join in the petition and all the party petitioning are non-residents, as required under the judiciary act; but it is a great mistake to suppose that any such right is conferred by that act where one or more of the plaintiffs or one or more of the petitioning defendants are citizens of the state in which the suit is pending, as the act is destitute of any language which can be properly construed to confer any such right unless

all the plaintiffs or all the defendants are non-residents and join in the petition. *Bryant* v. *Scott*, Dev. & B. Eq. 155; *Hazard* v. *Durant*, 9 R. I. 609; *Waggener* v. *Cheek*, 2 Dill. 565; *Case* v. *Douglas*, 1 Dill. 299; *Bixby* v. *Course*, 8 Blatch. 73; *Ex parte Andrews and Mott*, 40 Ala. 648; *Peters* v. *Peters*, 41 Geo. 242; *Cooke* v. *State National Bank*, 52 N. Y. 113.

Two cases only, besides the opinion given in this same case in the circuit court, to wit, *Johnson* v. *Monell*, 1 Wool. 390; *Sands* v. *Smith*, 1 Dill. 290, are cited to support the assumed theory, neither of which necessarily involved any such question, and the reasons given for the conclusion by the learned circuit judge, on the motion to dismiss the case in the circuit court, are not satisfactory. *Judgment affirmed.*

MILLER, J. I dissent from the opinion of the court in this case in reference to the construction of the act under consideration, and for this reason I dissent from the judgment.

BRADLEY, J., concurred in the dissent.

SUPREME COURT OF NEW YORK. — GENERAL TERM.

[OCTOBER TERM, 1873.]

TRADE-MARK. — GEOGRAPHICAL NAME. — INTENT.

LEA v. *WOLFF.*

When it is apparent that there is an intention to deceive the public by the use of the name of a place and the word descriptive of an article, such deception will not be protected by the pretence that such words cannot be used as a trade-mark.

Where words and the allocation of words have, by long use, become known as designating the article of a particular manufacturer, he acquires a right to them as a trade-mark, which competing dealers cannot lawfully invade.

The essence of the wrong is the false representation and deceit, on proof of which an injunction will issue.

APPEAL from so much of an order of special term as denied an application for an injunction *pendente lite* restraining defendants from employing the words "WORCESTERSHIRE SAUCE" as a trade-mark.

FANCHER, J. The imitation of the plaintiffs' labels on the celebrated article of their preparation was so palpable that the learned judge at special term granted an injunction against the defendants, restraining such imitation. He, however, held that in regard to the name — "Worcestershire Sauce" — "it contains nothing but the name of the place where it is manufactured, and the word 'sauce' as descriptive of the article sold," and that "neither of these words can be used in such a manner as to give the exclusive use of them as a trade-mark." The learned judge referred to several decisions as authority upon the point. Among them is a case decided by himself, *Wolfe* v. *Goulard*, 18 How. Pr. Rep. 64. That case has been cited with approbation in thirteen States of the

Union. Perhaps the cases are so numerous as to establish a uniform current of authority in favor of the principle enunciated at special term.

But we are not called upon to extend the principle to a case where it is not strictly applicable. For the purposes of this case it is not necessary to deny that the name of the place where an article is manufactured, and the word which is descriptive of the article manufactured, may not be used by any tradesman who there makes and vends the article. That is not this case. The defendants' preparation is not manufactured at "Worcestershire," the plaintiffs' is and has been for more than thirty years. The adoption, under such circumstances, of the very words contained in the plaintiffs' trade-mark, and the imitation in colors, size, language, and appearance of their labels and wrappers, are irresistible proof of an intention of the defendants to deceive the public and to lead purchasers to suppose that the defendants' preparation was the original Worcestershire sauce, so long manufactured by the plaintiffs. Where such an intention exists, the defendants should not be protected in their fraudulent imitation by the pretence that in the words employed the name of a place and the word descriptive of the article only are used. The defendants, doubtless, might, under proper circumstances, employ the name of a place where an article is manufactured, as well as the word descriptive of its character; but such words must be employed honestly and properly, and not with a design to imitate and deceive to the detriment of another. Where words or names are in common use, no one person can claim a special appropriation of them to his peculiar use; but where words, and the allocation of words, have by long use become known as designating the article of a particular manufacturer, he acquires a right to them, as a trade-mark, which competing dealers cannot fraudulently invade. The essence of the wrong is the false representation and deceit. When the improper design is apparent, an injunction should be issued. In such cases injunctions have been sustained, though the name of a place, or of a celebrated person, were within the trade-mark protected by the injunction. *Messerole* v. *Tynberg*, 4 Abbott Pr. R. N. S. 410; *Matsell* v. *Flanagan*, 2 Abbott Pr. R. N. S. 459; *Amoskeag Man. Co.* v. *Spear*, 2 Sandford S. C. 599; *Caswell* v. *Davis*, 4 Abbott Pr. R. N. S. 6; *Newman* v. *Alvord*, 49 Barbour, 588; *Wotherspoon* v. *Currie*, 5 L. R. App. Cases, 518.

In the last-mentioned case the plaintiff had purchased from Fulton & Co., of Glenfield, near Paisley, the good-will and trade-mark of their business. They had for several years prior to 1847 manufactered powdered starch, principally from East India sago, which was called "Glenfield patent double refined powder starch," and commonly, "Glenfield starch." The plaintiff had actually removed his manufactory from Glenfield to Maxwelton, where the starch was made and sold, when he applied for an injunction against John Currie, trading as Currie & Co. Currie had rented a small building from Fulton & Co., at Glenfield, where he manufactured starch, which was sold in packets similar in size and appearance to those of the plaintiff, and which he labelled "The royal palace double refined patent powder starch, manufactured by Currie & Co., Glenfield."

The plaintiff's case was that the defendant had taken the small building at Glenfield, and adopted the mark or label containing the name of that place, for the express purpose of inducing people to believe that his starch

was the article made by the plaintiff. The vice-chancellor granted an injunction, although the defendant was an actual resident at Glenfield and his manufactory was there. It was dissolved on appeal, but reinstated and affirmed by the house of lords. The vice-chancellor said, "that no man had a right to avail himself of a trade-mark, or to adopt any other means whereby he should induce people to purchase his goods under the belief that they were purchasing the goods of another man;" and he was of opinion that "the defendant had pursued that course with the deliberate and fraudulent intention of palming off his starch upon the public as the starch of the plaintiff, and acquiring a sale of his starch by means of the connection and reputation of the plaintiff.

In *Newman* v. *Alvord*, 49 Barb. 588, it appeared that the plaintiffs for thirteen years had carried on business at the village of Akron, in the county of Erie, where they manufactured and sold cement, or water-lime, which they designated as "Akron cement" and "Akron water-lime." The defendants manufactured an article in Onondaga County, which they labelled "Alvord's Onondaga Akron cement or water-lime, manufactured at Syracuse, New York." They were perpetually enjoined from using the word "Akron" on their bills and labels, or in any other way in connection with the manufacture or sale of their cement or lime. The judgment awarding the injunction was affirmed at the general term, and also by the commission of appeals.

As a general rule geographical names cannot be appropriated as trade-marks, but the rule has its exception where the intention in the adoption of the descriptive word is not so much to indicate the place of manufacture as to intrench upon the previous use and popularity of another's trade-mark.

The order appealed from should be modified and the injunction extended so as to prohibit the use of the words "Worcestershire sauce" on the bills, labels, and wrappers of the defendants.

BRADY, J., concurred.

DISTRICT COURT OF THE UNITED STATES.—EASTERN DISTRICT OF PENNSYLVANIA.

[JULY, 1874.]

ADMIRALTY.—SALVAGE SERVICE BY PASSENGER.

BRADY v. *AMERICAN STEAMSHIP CO.*

The rule is that a passenger cannot be a salvor, and any exception to it is to be admitted with the greatest caution.

Where a passenger, who was a master navigator, assumed command of a ship of great value during a violent storm and after the master and other officers had been lost, and rendered efficient service during the continuance of the storm: Held, that he was to be regarded as a salvor.

But having acted as master after the subsidence of the storm such passenger was held to have thereby detracted materially from the merit of his services, and the compensation was reduced accordingly.

THE facts are set forth in the opinion.

Messrs. *R. E. Shapley & C. M. Neal*, for the libellant.

Messrs. *Theodore Cuyler & M. P. Henry*, *contra*.

CADWALLADER, J. A vessel manned and otherwise fitted for a voyage is often spoken of as having an organized representative or artificial personality. A public armed vessel represents the sovereignty of the nation to which she belongs. A merchant vessel represents a little private community. It is a definite organized portion of the social system of her nation. Judges, on both sides of the Atlantic, have assimilated such a vessel, when on the high sea, to a floating portion of this nation's territory, of which, though temporarily detached, it continues to be a part. Her internal relations are determined by its laws, and her external relations by the laws of the sea, which constitute a part of the system of universal jurisprudence. Under certain qualifications, her ex-territoriality is, through international comity, recognized, even when she is in foreign territory.

These observations, in part, explain the remark of Montesquieu, that mariners are citizens or inhabitants of the vessel. They cannot rightfully leave her, unless their association with her is legally at an end, through the conventional termination of their voyage, or otherwise. Till then they can be compulsorily detained in her.

The relation of a passenger to the vessel is different. If a sailor has been rightly described as an inhabitant of the vessel, and as in subjection to her government, a passenger may be compared to a mere sojourner in her who is only in temporary subjection. A passenger, while on board, may, indeed, be considered as one of her company, but not in the same light as one of the crew. The passenger may leave her at his pleasure, if an opportunity occurs before the end of his conventional passage; and may do so even in time of danger, however great.

For this reason, if the vessel is in distress, and a passenger who has an opportunity of leaving her chooses to remain on board, he may stand afterwards, upon a question of salvage service, nearly or quite in the same relation as if he were not associated with her at all. He may therefore entitle himself to compensation of the nature of salvage, by rendering even service of ordinary bodily labor, as in pumping, or otherwise. But where he has had no such opportunity of dissociating himself from the vessel, he is, in time of danger, compellable to render, to the utmost of his ability, like service with any other person of her company; and, as to such service, cannot have any claim of salvage.

It by no means follows that a passenger peculiarly capable of rendering extraordinary service, far beyond that of one of a good crew, is, in all cases whatever, compellable to render it; or that, if he does render it with useful effects, he cannot, in any case, become entitled to compensation of the nature of salvage. We may suppose the case of a ship, or her cargo, partially on fire, the ship having on board a passenger who is a chemist, with a sort of travelling laboratory. He may have, in this laboratory, the probable means of checking the fire, but perhaps not without some risk to himself and others, of increasing the danger. If, by professional skill and judgment, under the authority of the navigator of the vessel, the chemist makes the experiment, and there is a successful result, is he to receive no

compensation? If he should be compensated, is not the compensation for a service of the nature of salvage?

The decision in the case of the steamer *Great Eastern* answers the question. When that vessel was three hundred miles from land, her paddle-wheels were disabled, so that she could be moved by the screw alone. While she was in this condition, the rudder shaft was broken, and was disconnected from the steering gear, so that she became quite unmanageable. Her officers in vain endeavored to substitute and secure some appliance by which to work the shaft. A passenger, who was a mechanician, then devised, and, with the consent of the master and the assistance of the crew, executed a plan for the purpose, which was successful. This was done by a skilful use and adaptation of fixtures, tackle, and apparel of the vessel herself. For the service $15,000 was decreed to the passenger as salvage. 11 Law Times, N. S. 516. The reason of the decision was that this highly beneficial service had been peculiar and extraordinary, and such as he was not compellable to perform. This decision is, I think, right in principle. But it establishes what must be considered as an exception from a rule. The rule is that a passenger cannot be a salvor. The exception, lest it should engender litigation, and promote insubordination, must not be admitted without the greatest caution. Especially must such caution be observed where the passenger is of the nautical profession.

In the present case, a large steamer, worth perhaps half a million of dollars, with passengers and a cargo, having four officers, beside the master, encountered in mid-ocean a tempest of great violence. During the storm, when changing watches at midnight, she shipped a heavy sea which stove in the forward hatches, and swept away the house forward, carrying overboard the master and first and second officers, with two of the crew.

So long as any officer of a vessel is on board, and not disabled, there can be no suspension of the executive authority of her internal government. Therefore, at this crisis, the command legally devolved, at once, upon the third officer. He, however, did not assume it, but was for some time fully and usefully engaged in securing the forward hatches, or in superintending the securing of them. The fourth officer had been previously disabled, and was not on duty. The wheel was fully and properly manned, and this was at no time otherwise. But there was no officer of the deck surviving, and there was urgent necessity for such an officer to give directions to the men at the wheel. It was a crisis of great peril. There was, at all events, great seeming danger; and it would now be mere idling to inquire speculatively how far actual danger may really have existed. The after-born supposed wisdom from such a retrospect might be arrogant folly. There certainly was also great alarm, with ample supposed cause; and a general panic, if not prevented, might have soon ensued; and this might, in its consequences, have been dangerous if not disastrous.

At this crisis the libellant intervened meritoriously. He was on board simply as a passenger, who, as such, had paid his fare. He was a competent professional master navigator, with former experience in the command of sailing vessels and of steamers. He went to the wheel-house and promptly assumed command or direction there, doing whatever was nec-

essary and proper for the exigency. He thus averted until the termination of the storm, whatever danger may have been caused by the unfortunate loss of the master.

I think that this was a salvage service. The difficulties in the way of so deciding are great. But those in opposition to a contrary decision would be greater. It is true that when the third officer succeeded of right to the command of the vessel, he might have ordered the libellant to take the watch during the emergency. The libellant would certainly have been compellable to go to the wheel-house. If he had been directed, when there, to act as officer of the deck, it would, I think, have been his duty to obey, and to execute the office to the best of his ability. Had he done so, under such orders, I do not, as at present advised, think that it would have been a salvage service. But, without orders, he was not compellable to decide who should have the watch, or to take upon himself the direction, with its cares and responsibilities.

At the crisis of danger there was no means of organizing the internal government of the vessel, unless through immediate energetic action of the third officer. That officer did not thus act. The libellant was, therefore, justifiable, under the law of maritime necessity, in acting upon his own responsibility, as officer of the deck. There was, at this time, therefore, no usurpation of unlawful authority by him. This being so, his conduct thus far was meritorious and highly beneficial; and the service was, under the circumstances, extraordinary. It was a peculiar service for one who was not of the crew to take the command of the watch without being assigned to it.

On the next morning, the storm having ceased or abated, and no special danger continuing to exist, the chief engineer and the purser, and some others on board, without consulting the third officer, whose authority alone they should have recognized, wrongfully assumed upon themselves to offer the command of the vessel to the libellant, and urgently invited him to assume it as master. He very improperly did so. He did not consult the third officer, but nominated him as first officer. It is contended that the third officer acquiesced in what would thus otherwise have been a usurpation. An English judge has recently said that quiescence is not acquiescence. Mere enforced submission certainly is not. The third officer here submitted, but did not acquiesce.

The libellant continued to act in this usurped relation of master of the vessel for several days, until she reached the port of destination.

On her arrival, the owners, who are here defendants, gave thanks, in writing, to the libellant, as for extraordinary services, and offered him what would have been a liberal gratuity for meritorious conduct if he had been an officer of the vessel. But the amount offered was greatly below the least possible estimate of compensation for a salvage service.

He now alleges that he became of right master of the vessel, and thus rendered a continuing salvage service. This unfounded pretension is of course rejected.

The question then arises, whether through his usurpation of the command of the vessel after the storm, he has incurred a forfeiture of the salvage compensation to which he was otherwise entitled for his prior service.

I do not think that under the peculiar circumstances of the case an absolute forfeiture of the whole amount was incurred retroactively by his assumption and exercise of the illegitimate authority. But the effect of this usurpation must necessarily be to reduce very materially the amount which would otherwise be awardable to him.

What the reduced amount ought to be is not easily determinable. I have hesitated between three thousand and four thousand dollars, and have determined on the greater sum, partly because I think that the defendants' letter of thanks almost invited the litigation which has followed, and, though not so intended, must have induced a high estimate by the libellant of the value of the service.

Costs are adjudged to the libellant; but under the head of depositions, taxable costs will not be allowed to an amount exceeding two hundred dollars. The testimony is of great bulk, but of no proportionate weight; and its excess in bulk ought not to be allowed to swell the costs.

Decree for libellant for four thousand dollars, provided that, under the head of depositions, costs exceeding two hundred dollars will not be taxed or allowed.

CIRCUIT COURT OF THE UNITED STATES. — SOUTHERN DISTRICT OF ALABAMA.

[APRIL, 1874.]

NEGLIGENCE BY TELEGRAPH COMPANY EXPOUNDED. — UNINSURED MESSAGE. — DELAY IN DELIVERY.

DORGAN v. *THE TELEGRAPH COMPANY.*

A telegraph company undertakes to receive and transmit by telegraph, and to deliver, without unnecessary delay, according to directions, the messages offered for transmission.

Where a message was left at the office of defendant in New York at about twenty minutes after five o'clock P. M. *for transmission to Mobile, Alabama, and was not delivered at the office of the person addressed until half past ten o'clock the next forenoon, and it appeared that under ordinary circumstances it would only require four minutes to transmit the message, and the plaintiff had paid uninsured day rates for its transmission, the court instructed the jury that the facts made out a primâ facie case of negligence.*

Those who use the telegraph as a means of communication, unless they insure the delivery of their messages, take the risk of delay and failure of their messages to reach their destinations arising from the accidents and obstructions to which telegraphic lines are liable.

It is the duty of a telegraph company to transmit messages impartially in good faith and in the order in which they are received.

Therefore, if the company proved that the delay in the transmission of the message was not owing to the carelessness or negligence of its agents, but to obstructions in the line which the company could not foresee or prevent, or that the delay arose from the observance of the rule that messages must be sent in the order in which they are received, then the primâ facie case of negligence is overthrown.

Whether it is negligence to fail to deliver a day message received after ten o'clock P. M. *will depend upon the circumstances of the case, and the jury was directed to pass upon the question of negligence according to the facts as they should find them.*

If the damage suffered by the plaintiff from the negligence of the company might have been avoided by the use of ordinary diligence by the plaintiff, in that case the plaintiff cannot recover.

The plaintiff can only recover such damages for the failure to transmit and deliver his message as were within the reasonable contemplation of the parties when the contract for transmission was made.

If the sender of a message, at the time he left it for transmission, informed the telegraph company that it was important, and the dispatch itself indicated that it was a business message, and that serious damage might result if it was not promptly sent, the company would be liable for any damage which might be the result of negligent delay in sending the message.

But if the message was so worded as not to show that damage might follow delay in sending it, and the company was only told that it was important and requested to send it immediately, in such case the telegraph company would only be liable for nominal damages.

If negligence occurred in the delivery of the message after it had reached its office of destination and the message did not indicate its own importance, then the sender would only be entitled to nominal damages, no matter what might have been said at the other end of the line touching the importance of the message.

A telegraph company cannot contract for immunity from liability for the non-delivery of a message after it has reached its office of destination. Such a contract is against public policy and void.

THIS cause was tried by Woods, Circuit Judge, and a jury at the April term, 1874. The facts sufficiently appear in the charge of the court.

Messrs. *Harry T. Toulmin & D. P. Bestor*, for plaintiff.

Messrs. *Thomas H. Herndon & John Little Smith*, *contra.*

WOODS, Circuit Judge, charged the jury as follows: —

Gentlemen of the Jury, — The following facts are not controverted:

At about eleven o'clock A. M. of the 30th of January, 1872, the plaintiff sent from Mobile, Alabama, over the lines of the Western Union Telegraph Company to New York city, the following cipher dispatch: —

"To J. S. Abbott & Co., New York:

"Sell Samuel basis silver full style and staple fob dog demon. Reply to-day; have refusal."

Which, when translated, reads as follows: —

"Sell 500 bales, basis middling, full style and staple, free on board at 21⅛ cents, at ⅛ penny freight. Reply to-day; have refusal."

This dispatch was transmitted to New York and there delivered without unreasonable delay to J. S. Abbott & Co. On the same day, sometime between twenty and forty minutes after five o'clock P. M., New York time, J. S. Abbott & Co. delivered to the receiving clerk at the main office of defendant, in New York, to be transmitted over the lines of defendant to the plaintiff in Mobile, the following cipher dispatch, the same being in response to the dispatch sent by the plaintiff to J. S. Abbott & Co: —

"Sold Samuel, basis silver, fob dog demon, prompt shipment, draw

with documents. Edward Dobell. Insure. Telegraph drafts." The meaning of this dispatch was not communicated to the defendant or its agents, but the clerk who received it was told it was important, and requested to forward it immediately. A majority of persons who send messages by telegraph say to the receiving clerk that their messages are important and request that they be sent at once.

This dispatch translated would read: "Sold 500 bales, basis middling, free on board at 21⅛ cents, freight ⅛ penny; prompt shipment. Draw with documents on Edward Dobell. Insure against fire. Telegraph drafts."

The dispatch was received in Mobile at ten o'clock P. M. of January 30, but was not delivered to the plaintiff in Mobile until half past ten o'clock A. M. of the next day. The time required to transmit a message of ordinary length from New York to Mobile, when the lines are in good order and there is no other message having the precedence, is about four minutes.

On January 31st the plaintiff bought five hundred bales of cotton in Mobile to fill the contract of sale referred to in the dispatch to him, at the price of fifty-four thousand one hundred and ninety-nine dollars and twenty-eight cents, and the same cotton could have been purchased in Mobile on January 30th for eight hundred and ninety-nine dollars, and forty-three cents less than that sum.

New York time is fifty-five minutes faster than Mobile time, so that when it is five o'clock P. M. in Mobile it lacks but five minutes of six P. M. in New York.

J. S. Abbott & Co., to whom the plaintiff's message was addressed and who sent the reply, were the agents of the plaintiff in New York, and the plaintiff paid for both dispatches. He paid for the dispatch from J. S. Abbott & Co., three dollars and sixty-nine cents, which was the usual day rates for unrepeated and uninsured messages.

The message sent by J. S. Abbott & Co. was written upon the blanks furnished by the defendant for day messages, and upon which it required day messages to be written.

The business office of plaintiff in Mobile is but one or two blocks from the office of defendant, and his residence about a mile or a mile and a half. It is the custom of the defendant at half-past nine o'clock P. M. to dismiss its messenger boys for the day, and at ten o'clock P. M. to close its office. The plaintiff before January 30th 1872, had done much business with the defendant's office in Mobile.

The plaintiff alleges that the delay in not delivering the dispatch sent by J. S. Abbott & Co. to him until January 31st was the result of the carelessness and negligence of the defendant and its agents, and that he suffered damage to an amount equal to the difference in the value of five hundred bales of cotton in Mobile on the 30th and of the same quantity of cotton in Mobile on the 31st of January.

To the declaration of the plaintiff setting up this claim, the defendant pleads a general denial of the case stated by the plaintiff, with leave to introduce evidence in proof of any matter that might be specially pleaded.

The defence as really made amounts to this: —

(1.) That generally the averments of the declaration are not true.

(2.) That there was no negligence or carelessness on the part of the defendant in transmitting or delivering the message.

(3.) That if the plaintiff suffered damage from the neglect of defendant, he contributed to the damage by his own neglect and carelessness.

(4.) That if the plaintiff suffered any damage by the delay in the transmission and delivery of the dispatch, it was a damage not within the reasonable contemplation of the parties when the contract for sending the message was made between them.

(5.) That the printed blanks, upon which the defendant required messages to be written, contained a clause exempting the defendant from liability from all except nominal damages for delay in the delivery of unrepeated messages, and that in any event the plaintiff can only recover nominal damages.

Your first duty, under the pleadings in this case, will be to inquire whether the plaintiff has made out his case by proof, substantially as he has stated in his declaration.

So far as this part of the case is concerned, the only point in dispute between the parties is as to the question of negligence.

Prompt and speedy communication between different localities is one of the most urgent wants of the present age. To meet this demand telegraph companies are chartered, and they engage to subserve the public interests by transmitting intelligence promptly and speedily. Their engagement is to receive and to transmit by telegraph and to deliver, without unnecessary delay, the message according to the directions.

Persons whose messages do not require the most rapid transmission and speedy delivery, take the cheaper and slower method of communication afforded by the mails. When a telegraph company therefore receives a message for transmission, the fair inference is that the sender resorts to the telegraph because he cannot or does not choose to wait for the mail, and the telegraph company agrees by implication that his message shall be carefully transmitted by telegraph and delivered without unnecessary delay. 2 Redfield on Railways, 287-304; Law of Telegraphs, sections 146, 187, 188, 352; Allen's Telegraph Cases, 71, 114, 284, 335, 563, 570; *Sweetland* v. *Telegraph Co.* 27 Iowa, 433.

You will therefore inquire whether there was negligence on the part of the defendant in either transmitting or delivering the message in question.

It is admitted that the message was left at the office in New York, for transmission to Mobile, at about twenty minutes after five P. M., and that it was not delivered until half past ten the next morning; and that under ordinary circumstances it would require only about four minutes to transmit the message from the office of the defendant in New York to its office in Mobile; and that plaintiff paid day rates and not night rates for the message.

These facts being conceded, I instruct you as a matter of law, that a *primâ facie* case of negligence is made out against the defendant. *Moore* v. *Westervelt*, 1 Bosw. 357; Allen's Telegraph Cases, 284, 345, 570; Law of Telegraphs, section 370; Shearman & Redfield on Negligence, 610.

The admitted facts having established the negligence of the defendant, the burden of proof is put upon defendant to rebut the *primâ facie* case

thus made. For although the facts unexplained show negligence, the defendant may, by evidence, so excuse and explain its conduct as to make it perfectly clear that there was, in fact, no negligence whatever.

This the defendant has undertaken to do. It claims to have shown that the message was not promptly transmitted on account of obstructions beyond its control, and which are peculiarly incident to the transmission of intelligence by telegraph. The rule of law governing this branch of the case may be thus stated: Those who use the telegraph as a means of communication, unless they insure the delivery of their messages, take the risk of delay and failure of their messages to reach their destination arising from the accidents and obstructions to which telegraphic lines are liable.

Apply this rule of law to the facts in this case. Has the defendant satisfied you by the evidence that the reason why the message of plaintiff did not reach Mobile until ten o'clock P. M. was owing, not to the negligence or carelessness of any of the defendant's agents, but to obstructions in the line which the defendant could not foresee or prevent. If you so find, then the defendant has succeeded in disproving the charge of negligence so far as the delay in the transmission of the message to Mobile is concerned.

It is the duty of a telegraph company to transmit messages impartially, in good faith, and in the order in which they are received. *Crouch* v. *Railroad Co.* 14 C. B. 255; *Johnson* v. *Railroad Co.* 4 Exch. 367; *Wibert* v. *Railroad Co.* 2 Kernan, 245.

If the defendant has satisfied you that its adherence to this rule contributed to the delay in the transmission of the plaintiff's message, and that such adherence, combined with obstructions in the working of the line, caused the delay in the transmission until ten o'clock P. M., then the *primâ facie* case of negligence, so far as concerns the transmission of the dispatch, is overcome, and you should find that the defendant was not in fault in failing to transmit the message at an earlier hour.

Under these instructions you will determine whether the defendant was guilty of negligence in not transmitting the dispatch to its destination before ten o'clock P. M.

If you shall be of opinion that the telegraph company was not in fault, but used due diligence to transmit the message, and was prevented from so doing as claimed, you will then proceed to inquire whether the defendant has shown that there was no negligence in the delivery of the message after its arrival in Mobile.

Was the defendant bound to deliver the message after ten o'clock at night?

If the message showed upon its face that its delivery that night was a matter of importance to the plaintiff, and that a failure to deliver immediately would involve him in loss, and it appeared that the message was a day message and had been delayed, then it is for you to say whether due diligence did not require of defendant to deliver the message at once, or at least make an effort in good faith to do so.

If, on the other hand, the message did not on its face indicate the importance of immediate delivery; if the plaintiff had left no notice at the office of defendant that he expected an important message, and had not requested

its immediate delivery, and the message actually arrived after the messenger boys had been dismissed for the night, and after the hour for closing the telegraph office had passed, and after the plaintiff had closed his own office and gone to his residence, a mile, or a mile and a half from the telegraph office, — if you find these facts, then you will consider and determine whether due diligence required under these circumstances the delivery of the message on the night of the 30th of January. If you find that it was not reasonable, under the circumstances, that the defendant should be required to deliver the message on the night of its reception, you will be justified in the conclusion that the defendant was not guilty of negligence in not delivering the message on the night of the 30th; and you should then inquire whether there was negligence in not delivering the message at an earlier hour than half past ten o'clock A. M. of the next day.

Ought the defendant to have delivered the message at an earlier hour on the 31st? Before passing upon this question there is another raised by the evidence that you should decide upon. The defendant claims to have introduced proof sufficient to show that the message was taken to the office of defendant between eight and nine o'clock A. M., and was not delivered because there was no one there to receive it. Whether this is the fact, or whether the message was taken to the office of plaintiff for the first time at half-past ten o'clock A. M., you will decide whether there was, under all the circumstances, negligence in the delivery of the dispatch on the morning of the 31st.

If under these instructions applied to the facts you shall be of opinion the defendant has rebutted the *primâ facie* case of negligence made by the plaintiff, and has explained satisfactorily the delay in the transmission and delivery of the message, then that is the end of the case, and it will be your duty to return a verdict for the defendant.

If, on the other hand, you should be of opinion that the defendant has been guilty of negligence in the premises, you will then proceed to consider other matters of defence.

One of them is that if the plaintiff suffered any damage he contributed to bring it about by his own carelessness and neglect.

The rule of law upon this branch of the defence has been thus stated: One who is injured by the mere negligence of another cannot recover any compensation for his injuries if he, by his own ordinary negligence, contributed to produce the injury of which he complains.

See Shearman & Redfield on Negligence, sec. 25, and cases there cited.

I give you this as the law upon the point in question.

The defendant insists that the plaintiff, by sending a message of inquiry to New York might have avoided the loss of which he complains, and that, had he acted as a prudent man, he would have done so. That being in negotiation for the sale, both in New York and Liverpool, of the same five hundred bales of cotton, which he alleges he had on hand on the 30th inst., having made an offer to sell in New York, he should not have sold in Liverpool without ascertaining definitely whether his New York offer had been accepted.

Now, this is a point upon which you must judge. What were the dictates of ordinary prudence and care? If a prudent and careful man

would have telegraphed to New York before closing the sale in Liverpool, and by failing to take this precaution the plaintiff has contributed to his own damage, and if by the use of this means he might have, and should have, avoided the injury, he cannot recover. His own negligence is a complete bar to his recovery. As men of experience in business affairs, you must determine whether in this respect the plaintiff was in fault.

If upon this issue you find for the defendant, that, also, will put an end to the case, and it will be your duty to return a verdict for the defendant.

If you shall be of opinion that the defendant was guilty of neglect, whereby the plaintiff suffered damages, and that the plaintiff did not contribute to his own damage by his own neglect and could not have avoided the damage by the exercise of ordinary prudence and skill, then it will be your duty to return a verdict for the plaintiff for some amount.

Ordinarily, this amount would be the difference between the value of five hundred bales of cotton in Mobile on the 30th of January, 1872, and of the same quantity of cotton in the same place on the next day. This difference is shown to be $899.43.

But what that amount should be in this case will depend upon some considerations which I am about to submit to you.

The damage sustained by the defendant must have been within the reasonable contemplation of the parties at the time the contract for the transmission of the message was made. If the plaintiff, through his agent in New York at the time he left the message for transmission, informed the defendant's agent that the message was important, and the dispatch itself indicated that it was a business message, and that serious damage might accrue to the plaintiff if it was not promptly transmitted, it became the duty of defendant to use diligence to put it upon its transit, and it would become liable for the damage which might be the result of negligent delay in sending the message. But if the plaintiff's agent simply said it was an important message and requested its early transmission, but the dispatch itself was so worded that it did not in any way indicate that the plaintiff might suffer damage by its delay, then the plaintiff would only be liable for nominal damages.

If the negligence should be found in the delivery of the dispatch, after it had reached its destination, you should not give any weight in estimating the damages to what was said by the plaintiff's agent at the other end of the line about the importance of the dispatch. The question is, was the agent of the company here in Mobile, under the circumstances, and looking to the words of the dispatch, put upon notice that a failure to deliver it promptly would entail a serious damage upon the plaintiff. If he was, that is sufficient to sustain the plaintiff's claim to recover all the damage that he has sustained. If he was not, if it only appeared to the agent in Mobile to be a dispatch announcing a sale in New York of five hundred bales of cotton in response to an offer by the plaintiff to sell that amount made at a certain hour in the day by message from Mobile, and gives information about the details of the sale, and if it contained no reasonable notice that damage might accrue from delay in its delivery, then the damage for the delay would be nominal only.

Another matter should be borne in mind in estimating the damages, namely, that you are only to allow such damages as were caused by the

negligence of the defendant. Was there any negligence of defendant on the 30th of January? If there was, would the plaintiff have been able to avoid the injury he claims to have suffered, even had the defendant been prompt in transmitting and delivering the message. In other words, could the plaintiff after the time when he claims the message should have reached him on the 30th, have purchased five hundred bales of cotton for any less amount than he was compelled to pay the next day. If he could not, his damage is not the result of the neglect of defendant, and he cannot recover. But suppose you should find there was no neglect on the 30th, but there was neglect on the 31st of January? You will then inquire whether if the defendant had delivered the message on the 31st, at the time demanded by its duty, the plaintiff could have avoided loss. Suppose you should conclude that the message should have been delivered at seven o'clock or eight o'clock or nine o'clock A. M., of the 31st; could the plaintiff have purchased five hundred bales of cotton cheaper at these hours than at half past ten, when the message was in fact delivered? If he has not satisfied you that he could, then he can only recover nominal damages.

There is but one point more that I deem it necessary to notice.

The blanks upon which the defendant requires all messages for transmission to be written contain, under the words "All messages taken by this company subject to the following terms," this stipulation, "To guard against mistakes, the sender of a message should order it repeated, that is, telegraphed back to the originating office. For repeating, one half the regular rate is charged in addition; and it is agreed between the sender of the following message and this company that the company shall not be liable for mistakes or delays in the transmission or *delivery* of any unrepeated message beyond the amount received for sending the same."

It is claimed by defendant that this stipulation was brought home to the notice of plaintiff; that his assent may be therefore presumed, and that it is binding, and limits the recovery in this case to the amount paid for sending the message.

Under the instructions I am about to give you, it will be unnecessary for you to consider whether this notice was assented to by the plaintiff or not. I instruct that so much of this alleged contract as provides that the company shall be liable for delays in the delivery, or for the non-delivery, of an unrepeated message only to the amount paid for sending the same, is not binding; the company had no right to exact it; that it is against public policy, and absolutely void.

The telegraph company is engaged in a *quasi* public employment. A large portion of the business of the civilized world is carried on by means of the facilities for intercourse which it affords. Incalculable sums depend upon the alacrity, care, and good faith which it brings to the discharge of its duties. The whole business of the commercial world is to a degree dependent upon it. The public has the right to exact at least ordinary diligence. A common carrier is not allowed to protect himself by contract from liability for the results of his own negligence. *N. Y. Central R. R. Co.* v. *Lockwood*, U. S. Supreme Court, Oct. Term, 1873. 1 Am. L. T. R., N. S. 21.

There seems to be no good reason why the same rule should not be ap-

plied to a telegraph company. Shearman & Redfield on Negligence, sec. 565; *True* v. *Telegraph Company*, 60 Maine Rep.; *S. C.* Allen's Telegraph Cases, 530; *Fraham* v. *Telegraph Co.* 10 Am. Law Reg. N. S. 319. *Cauber* v. *Telegraph Co.* Amer. Law Review, vol. 8, p. 374. I therefore instruct you that you should not allow this alleged contract for immunity for all except nominal damages for negligence to have any effect upon your verdict.

The jury returned a verdict for defendant.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

[To appear in 115 Mass.]

INJURY FROM ICE FALLING FROM ROOF OF HOUSE UPON PERSON TRAVELLING UPON HIGHWAY.

LEONARD et al. v. *STORER et al.*

The owner of a building with a roof so constructed that snow and ice collecting on it from natural causes will naturally and probably fall into the adjoining highway, is not liable to a person injured by such a fall upon him, while travelling upon the highway with due care, if the entire building is at the time let to a tenant, who has covenanted with the owner "to make all needful and proper repairs both internal and external," it not appearing that the tenant might not have cleared the roof of snow by the exercise of due care, or that he could not by proper precaution have prevented the accident.

Tort to recover for injuries sustained by the female plaintiff on account of snow and ice sliding from a building owned by the defendant upon her. In the superior court the following facts were agreed: —

"That in the winter of 1869, the defendant was the owner of a building on the southerly side of Winter Street, in the city of Boston, and contiguous to said street; that the said building was covered by a slated, pitched roof (the pitch of which is thirty-two degrees), upon which snow and ice collected and slid into said street, in the winter season, to the same extent to which it collected upon and slid from other pitched roofs of said pitch, and there was no guard or protection upon the building to prevent it so sliding; that said Winter Street was a public highway in the city of Boston, and the female plaintiff was passing along on said street, as she lawfully might, and as she was so passing along and using due care, and without any fault of hers, the snow and ice slid from the roof of said building upon her, whereby she was injured; that on the first day of May, 1857, the defendant leased the said building and premises to Jacob Fullerton, for the term of fifteen years from that date, by a written lease, duly executed, by the terms of which the lessee took the entire building and agreed to 'make all needful and proper repairs, both external and internal, of the demised premises,' and the right was reserved to the lessor to 'enter or send agents into and upon the same to

examine the condition thereof;' that Fullerton took possession of the building under his lease, and was in possession thereof at the time of the accident; that the roof of the building at the time of the accident was in the same condition as when the lease was executed, it not having been altered or repaired during the time."

On these facts the superior court ordered judgment for the defendant, and the plaintiffs appealed to this court.

R. Lund for the plaintiffs. Upon the facts agreed in this case, either the defendant or the tenant is liable to the female plaintiff for her injuries in this form of action. *Shipley* v. *Fifty Associates*, 101 Mass. 251; 106 Mass. 194. The only question here to be determined is, whether upon the facts in the case the defendant, who is the owner of the building, is liable. Had the building been leased to different tenants, each one having a lease of different portions, all the questions would have been fully settled by the case above cited. But the defendant insists, that, as this was all leased to one tenant, the tenant had the full control of the entire building, and therefore the defendant is not liable. This might be so, if the accident had happened in consequence of any nuisance which the tenant had erected, or any change in the structure of the roof, which he had made. But the roof is in the same condition as when the lease was made. The tenant has not reconstructed it, or in any way interfered with it, and by the terms of the lease he had no right to make any change, only to make repairs, and then only to put it in as good condition as it was before. The lease provides what the tenant shall do, but does not provide for any change in the roof. The accident then does not happen by any neglect of duty on the tenant'a part, but was occasioned by the shape or slope of the roof, and from the proximity of the building to the street. The owner alone being responsible for the shape or slope of the roof, is alone liable. *Shipley* v. *Fifty Associates*, *supra*. In this lease, the landlord reserved the right "at all seasonable times to enter or send agents into and upon the same" (to wit, the building), "to examine the condition thereof;" therefore "he was not excluded from going upon the roof, and so altering its construction, that at all seasons of the year, it should not produce any inconvenience or danger to travellers on the highway below." Again, if it is said that the defendant had parted with his entire control of the roof of the building, he is guilty of negligence in putting it beyond his control, in an unsafe condition, without providing that the tenant should put it in safe condition, or at least give him permission to so do, which he did not do in this case.

J. P. Healy, for the defendant. The defendant had neither the duty nor the right to remove the snow from the roof, or to interfere in any way in the general management and care of the building. The plaintiffs therefore have no cause of action against him. Their remedy must be sought, if at all, against the tenant. *Kirby* v. *Boylston Market Association*, 14 Gray, 249, and cases cited; *Boston* v. *Worthington*, 10 Gray, 496.

AMES, J. It does not appear that the defendant had any connection with the injury complained of, except that he was the owner of the building in front of which it occurred. The whole of this building had been leased for a long term of years to a tenant who was in actual occupation

at the time of the accident. By the terms of the lease, the tenant had bound himself to make certain specific alterations in the lower story of the building, and also to make at his own expense "all needful and proper repairs, both internal and external, of the demised premises." The lessee was the occupant of the entire estate, and, as between himself and the public, was bound to keep the building in such a state of repair that the adjoining highway should be safe for the use of travellers thereon. "It is the occupier who is *primâ facie* liable to third persons for damages arising from any defect." *Kirby* v. *Boylston Market Association*, 14 Gray, 249, and cases there cited. The control of the tenant included the roof of the building, as well as its interior, and it does not appear that he might not have cleared the roof of snow by the exercise of due care, or that he could not by proper precaution have prevented the accident. We cannot say upon this report that any neglect of duty, or any wrongful act, on the part of the defendant, was the cause of the injury. In *Shipley* v. *Fifty Associates*, 101 Mass. 251, and 106 Mass. 194, it appeared that the roof was not in the control of the various occupants of the building, but of the owners, who were therefore held responsible for its condition. As the judgment of the court below does not appear to have been erroneous, it is therefore *Affirmed.*

DISTRICT COURT OF THE UNITED STATES. — SOUTHERN DISTRICT OF NEW YORK.

[JULY, 1874.]

BANKRUPTCY. — PRACTICE UNDER THE ACT OF JUNE, 22, 1874. — PETITION IN INVOLUNTARY CASES.

IN RE SOULL.

In involuntary cases where the petition has been duly filed prior to the passage of the act of June 22, 1874, it must be so amended as to show affirmatively that the requisite number of creditors, representing the prescribed amount, have joined therein. Otherwise there can be no adjudication. The petition must contain an allegation that the prescribed number and amount have joined, and the court must be satisfied by affirmative evidence of the truth of such allegation. The fact that there was a default prior to the passage of the act of June 22, 1874, which, at the time it took place, entitled the petitioning creditors to an adjudication, is of no moment.

The averment that the debtor suffered his property to be taken is not sufficient. It must be averred that he procured it to be taken.

BLATCHFORD, J. This is a petition in involuntary bankruptcy, filed on the 4th of June, 1874. The order to show cause was returnable on the 13th of June, and was duly personally served on the alleged bankrupt on the 5th of June. On the return day, proof of service was filed, but the alleged bankrupt did not appear, and, at the request of the petitioning

creditors, the matter was adjourned from time to time until after the approval of the amendatory act of June 22d, 1874, no adjudication being directed to be entered, and of course, no order of adjudication being entered. The petitioning creditors now ask for the entry of an order of adjudication, as on a default, for want of appearance. The papers are in due form under the statute as it stood prior to its amendment by the act of 1874, and, but for the provisions of the latter act, the right to an adjudication would be clear.

The 12th section of the act of 1874, amending the 39th section of the former act, provides, that an adjudication in involuntary bankruptcy can be made only on the petition of one or more of the creditors of a debtor "who shall constitute one fourth thereof at least in number, and the aggregate of whose debts provable under this act amounts to at least one third of the debts so provable. . . . . And the provision of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And in all cases commenced since the first day of December, eighteen hundred and seventy-three, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number and amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one fourth in number and one third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court, if satisfied that the admission was made in good faith, shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and, in cases hereafter commenced, ten days, within which other creditors may join in such petitions. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed, but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and, in cases hereafter commenced, with costs." The 13th section of the act of 1874, amending the 40th section of the former act, provides that if, on the return day of the order to show cause, "the court shall be satisfied that the requirements of section thirty-nine of said act as to the number and amount of petitioning creditors has been complied with, or if, within the time provided for in section thirty-nine of this act, creditors sufficient in number and amount shall sign such petition, so as to make a total of one fourth in number of the creditors, and one third in the amount of the provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise, it shall dismiss the proceedings, and, in cases hereafter commenced, with costs."

The provision in respect to all cases commenced since the 1st of Decem-

ber, 1873, and prior to the passage of the act of 1874, as well as those commenced after such passage, is, that the debtor is to be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one fourth at least in number of his creditors, and the aggregate of whose debts provable under the act amounts to at least one third of the debts so provable. It is suggested that this does not require that the petition shall show that the petitioning creditors constitute the prescribed number and amount; that it is for the debtor to come in, in the first instance, and assert that the petitioning creditors do not constitute the prescribed number and amount; and that if he does not, there need be no inquiry into the matter. I cannot concur in this view for several reasons.

(1.) The reasonable construction of the provision that the petition is to be the petition of one or more of the creditors, who shall constitute a given proportion, in number, of creditors, and whose provable debts shall constitute a given proportion, in amount, of provable debts, is, that the petition shall not only show that the petitioners are creditors, and how and to what amount severally, but shall also show that they constitute a body who have a right to invoke relief which can be given only to those who do constitute such body. Such construction was given to the 39th section as it formerly read; and the forms of petition prescribed by the supreme court required that the petition should contain, on its face, affirmative allegations of the existence of all the facts which were necessary prerequisites to the right to ask for an adjudication — such as, the residence or carrying on of business, by the debtor in the proper district, for the requisite period of time; the owing by him of debts exceeding $300; the provability of the petitioners' demand; the fact that the petitioners' demand exceeded $250, and its nature and character; and particulars showing the commission of some act of bankruptcy specified in the statute. The petition must, undoubtedly, be such as to show, on its face, a proper case, on comparing it with the statute, for entering an adjudication, if there be no appearance to it by the debtor. It cannot do this unless it shows, on its face, that the petitioners constitute the prescribed number and amount.

(2.) In addition to this, the provision is, that "if such allegation as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect," the court shall require him to file a list of his creditors, &c. It is suggested that this provision is satisfied by calling on the debtor to assert that the petitioning creditors do not constitute the requisite number and amount. But the statute says that "such allegation" is to be "denied" by the debtor. The use of the phrase, "such allegation," clearly implies that the allegation to be denied is one made by the petitioning creditor, and one made in the petition, and it is an allegation "as to the number or amount of petitioning creditors" that is to be denied. A denial implies a contradiction of an assertion. The assertion must precede the denial.

It is suggested that, inasmuch as the debtor was in default on the 13th of June, and the petitioning creditors were then entitled to have an adjudication, and the debtor has not appeared, the adjudication ought now to be made. The petition contains no allegation that the petitioning creditors constitute the prescribed number and amount. The debtor has not been

adjudged bankrupt, and the provisions of the act of 1874 apply, therefore, to this case, it having been commenced since the 1st of December, 1873. But the statute is very marked in requiring that the court shall have affirmative evidence, in the papers on which it makes an adjudication, that the provisions of the statute as to the number and amount of creditors petitioning are being complied with, and shall not necessarily repose on an admission by the debtor to that effect, much less on his failure to assert the contrary of what is not alleged. Such admission by the debtor, if made, must be made in writing, and then the court must be satisfied that it is made in good faith. This is undoubtedly in order to prevent collusion, and because of the provision of section 9 of the act of 1874, that in cases of involuntary bankruptcy, the bankrupt may receive a discharge, if otherwise entitled thereto, without paying any proportion of his debts, and without procuring the assent of any portion of his creditors, as a condition of his discharge; while, in cases of voluntary bankruptcy, no discharge can be granted to a debtor whose assets are not equal to 30 *per centum* of the claims proved against his estate, upon which he is liable as principal debtor, without the assent of at least one fourth of his creditors in number and one third in value. The view seems to be, that if one fourth in number and one third in value of the creditors petition in involuntary bankruptcy, they shall be regarded, under the provisions of the statute, as assenting to the discharge of the bankrupt, in like manner as one fourth in number and one third in value assent, in voluntary bankruptcy. Again, section 13 of the act of 1874 requires that the court must, on the return day of the order, to show cause, be satisfied that the requirement as to the number and amount of petitioning creditors has been complied with, or must have evidence that, within the time provided for, creditors sufficient in number and amount have signed the petition, so as to make a total of one fourth in number and one third in value, before it can make an adjudication to that effect; and that, otherwise, the court must dismiss the proceedings. This imposes on the court the duty of dismissing the petition, unless it appears affirmatively that such requirement has been complied with, or that, within the time provided for, the proper number and amount of creditors sign the petition. This, again, shows that a part, at least, of the evidence, that the petition is joined in by the proper number and amount of creditors, must be the fact that creditors sufficient in number and amount sign the petition within the time provided for, if it has appeared that a sufficient number and amount did not petition in the first instance. Now, it would be unreasonable to suppose that it was intended that the proper number and amount should sign the petition, without its appearing in the body of the petition, not only that the signers were by name and description petitioners, but that they constituted the requisite number and amount; and if these things are required in regard to the petition after time is granted for other creditors to join in it, it is reasonable to hold that the statute intends that the requirement as to the number and amount of petitioning creditors is not complied with, in the presentation of the petition in the first instance, unless it appears, in the body of the petition, by name and description, who are the petitioners, and that they constitute the requisite number and amount, and unless the persons so named as petitioners sign the petition. The petition may be sufficiently

verified by the oaths of the first five signers thereof, if so many there be. This means, that if there are five or less signers, all must verify the petition by oath; but that if there are more than five signers, it will be sufficient if the first five of them so verify it. This necessarily implies that there may be more signers than those who verify the petition by oath, and implies, also, that those who are petitioners must sign the petition.

As, in the present case, the petition does not state that the petitioners constitute the requisite number and amount of creditors, it must be held that it appears that the requisite number and amount of creditors have not petitioned. As the case was commenced before June 22d, 1874, an order will be entered herein by the clerk, if the petitioning creditors desire, granting twenty days from the formal entry of such order, as the time within which the petition may be amended so as to show a compliance with the requirement of the statute as to the number and amount of petitioning creditors; and providing that at the expiration of that time, or when such amendment shall be filed, if before the expiration of that time, the clerk shall present to the court all papers which shall have been filed herein, including those filed with a view to such amendment of the petition, to the end that the matter in bankruptcy may proceed, or the proceedings may be dismissed, as the case may be.

The only act of bankruptcy alleged in the petition is, that the debtor, being insolvent, *suffered* his property to be taken on legal process, with the intent to give a preference to a creditor and to defeat the operation of the act. This was an act of bankruptcy when the petition was filed. By the act of 1874, it is no longer made an act of bankruptcy. The debtor, being insolvent, must *procure* his property to be taken on legal process, with the intent to give a preference, or to defeat or delay the operation of the act; and all the provisions of the section of the act of 1874, which specifies what are acts of bankruptcy on which a person can be adjudged an involuntary bankrupt, are by it made applicable to the present case, commenced since December 1st, 1873. Therefore, if the present petition is to be proceeded with at all it must, in respect to the matter alleged in it as constituting the act of bankruptcy set forth, be amended by averring that the debtor *procured* his property to be taken. An amendment to that effect will be allowed to be made within the twenty days before provided for.

The provisions of the statute have been carefully considered in the above observations, because the number of petitions in involuntary bankruptcy, filed in this district, between December 1st, 1873, and June 22d, 1874, was three hundred and forty-six. Of this number, ninety-eight were discontinued, and in one hundred and eighteen others adjudications have been entered. This leaves one hundred and thirty in which no adjudication has been entered, and which come under the provisions of the act of 1874. In all of these one hundred and thirty, which are in the same situation as the present case of Isaac Scull, and in all of them in which the petition was filed before June 22d, 1874, and no order of adjudication was formally filed and entered before June 22d, 1874, the clerk will enter a like order if either party desires it.

BANKRUPTCY. — PRACTICE UNDER ACT OF JUNE 22, 1874, IN RESPECT OF PETITION. — JUDGMENT DEFINED.

IN RE HILL.

The signature by a judge of his initials to a memorandum upon the petition prior to June 22, 1874, will not warrant the signing of an order of adjudication, after that date, nunc pro tunc.

The petition must be made to conform to the requirement of the act of 1874 in every particular.

BLATCHFORD, J. The petition in this case, in involuntary bankruptcy, was filed on the 17th of January, 1874. The order to show cause was returnable on the 24th of January. On that day the debtor appeared and filed a denial in the usual form, and demanded a trial by the court, and an order was made referring it to a commissioner, to take the evidence. The commissioner's report of the evidence was filed on the 6th of March, the matter was brought to hearing before the court, and on the 18th of March a memorandum signed by the initials of the judge, was made by him on the petition, directing that an order of adjudication be entered. No such order was entered prior to June 22d, 1874, probably for the reason that the petitioning creditors did not desire or procure such order to be entered. I am now asked to sign such an order, *nunc pro tunc*, as of the 18th of March. I do not see how this can be done. The test must be whether a formal order of adjudication has been entered. Until the entry of such formal order, a discontinuance has always been allowed by this court to be entered, if desired by the petitioning creditor. A direction that such order be entered, the order not having been prepared in form, is no more than the decision of the judge. It is not a judgment, or an entry on the files of the court, that the court adjudges thus and so. The form of an adjudication of bankruptcy on a creditor's petition is prescribed by form No. 58. Nothing else is an adjudication or an adjudging, and, therefore, the debtor in the present case remained, on the 22d of June, 1874, "to be adjudged a bankrupt," under the provisions of the act of 1874, that is, on such a petition as I have held in the case of *In re Scull* to be the necessary form of petition. The clerk will enter, in the present case, the like form of order with that directed in the case of Scull, if either party desires it.

It is proper to say, that there are two acts of bankruptcy alleged in the petition. The direction for an order of adjudication was that it should be entered on the first act of bankruptcy alleged. That is an allegation that the debtor on the 22d of November, 1873 (fifty-six days before the filing of the petition), being a merchant, stopped payment of his commercial paper, and did not resume payment of it within a period of fourteen days. If the petition is to be proceeded with as to such first act of bankruptcy, it must conform to the act of 1874, by averring that the commercial paper was made or passed in the course of the business of the debtor as a merchant, and that he did not resume payment of it within a period of forty days. An amendment to that effect will be allowed to be made within the twenty days allowed for the amendment in regard to the number and amount of creditors.

BANKRUPTCY. — PRACTICE UNDER ACT OF JUNE 22, 1874, AS TO PETITION. — INSUFFICIENCY OF ADMISSION OF NUMBER AND AMOUNT OF CREDITORS.

IN RE KEELER.

In involuntary cases the petition must contain a proper allegation as to the requisite number and amount of petitioning creditors. The admission of the debtor that the terms of the law have been complied with will not dispense with such allegation. There can be no adjudication except it be made and shown to be true to the satisfaction of the court.

BLATCHFORD, J. The petition in this case, which is one in involuntary bankruptcy by a single creditor, contains no allegation that the creditor constitutes one fourth, at least, in number of the creditors of the debtor, and that the aggregate of his debts, provable under the act, amounts to at least one third of the debts so provable. It was filed July 23d, 1874. It is accompanied by a separate paper, purporting to be signed by the debtor, and reading thus: "The said James R. Keeler does hereby admit, that the requisite number and amount of his creditors have joined in the petition herein, and does consent that proceedings shall be had under said petition, as a petition signed by the requisite number and amount of his creditors." There is no authentication of the genuineness of the signature to this paper, nor is it verified by the oath of the signer. I have held, in the case of *In re Scull*, that the petition must contain the allegation which, as before said, this petition does not contain. The absence of such allegation, which, if in the petition, is verified by the oath to the petition, is not supplied by any admission by the debtor, much less by admission in form such as the one now presented, and not accompanied by any oath that the petitioning creditor does constitute the required number and amount of creditors. It is the allegation of the petition as to the number or amount of petitioning creditors, which, by the statute, the debtor may deny, by a statement in writing to that effect. The statute then says (Act of June 22d, 1874, § 12): "But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court, if satisfied that the admission was made in good faith, shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject." The purport of this provision, in view of the context, is, that the admission is to be an admission of an allegation in the petition, which shows that the requisite number and amount of creditors have petitioned, and which allegation is before the court, verified by the oath to the petition. The court, even after such admission in writing, is to be satisfied that the admission was made in good faith, before it can adjudge that the requisite number and amount of creditors have petitioned. Certainly, it cannot be thus satisfied on the present papers: a petition without the allegation; an admission not acknowledged or verified; no evidence of the authenticity of the signature of the debtor; no oath that the petitioning creditor constitutes the requisite number and amount of creditors; and an admission which states the legal conclusion, that the requisite number and amount of creditors have joined in the petition (without anything to show that the

debtor knows what such requisite number and amount of creditors is), instead of stating and admitting facts from which the court can draw such legal conclusion. The statute intends to exclude collusion, and not to permit a person to be adjudged an involuntary bankrupt unless the statute is strictly complied with. This is shown not only by such provision that the court must be satisfied that such admission of the debtor was made in good faith, but also by the provision of section 13 of the act of 1874, that the court must be satisfied that the requirement as to the number and amount of petitioning creditors has been complied with, or else must dismiss the proceeding.

I therefore cannot, on these papers, issue an order to show cause.

CIRCUIT COURT OF THE UNITED STATES. — EASTERN DISTRICT OF MICHIGAN.

[JANUARY, 1874.]

PRACTICE IN UNITED STATES COURTS. — VERIFICATION. — CONSTRUCTION OF EQUITY RULE 95. — ENTITLING OF AFFIDAVITS. — NOTARY PUBLIC.

BLAKE CRUSHER CO. v. *WARD.*

Notaries public are officers before whom affidavits may be taken and bills and answers verified within the meaning of existing laws.

Affidavits entitled as in a cause pending when no such cause was in existence cannot be read unless the entitling be rejected, which, if it render the affidavits meaningless in material particulars, will not be allowed.

Practice in respect of verification, and construction of Equity Rule 95.

MOTION for a preliminary injunction on bill of complaint and accompanying affidavits, to restrain the defendants from an alleged infringement of a patent for a stone crusher.

The affidavits were made, some in Connecticut and some in Pennsylvania, and were all sworn to before notaries public. They were all made before this suit was commenced. They are, nevertheless, all entitled in a cause the same as is the entitling of this case, notwithstanding that no such cause was pending or in existence at the times the affidavits were made.

The bill was signed and the verification of the same was by an agent and director of the complainant corporation; and the verification appears also to have been made before a notary public of the State of Connecticut.

No answer has been put in nor counter affidavits filed, but at the hearing of the motion the defendants appeared by counsel and opposed the granting of the motion on the grounds, 1. That the verification of the bill and the affidavits were not entitled to be read and used because they were not taken before an officer authorized to take the same to be used in this court. 2. The affidavits are entitled in a cause which had no exist-

ence when they were made. 3. That the verification of the bill is insufficient because it is upon information and belief only, and is otherwise defective.

Mr. *A. Russell*, for complainant.

Mr. *H. B. Brown*, for defendant.

LONGYEAR, J. *First.* As to the officers before whom the verification and affidavits were taken.

The act of Congress of July 29th, 1854 (10 Statutes, 315), provides, "That notaries public be and they are hereby authorized to take depositions, and do such other acts in relation to evidence to be used in the courts of the United States, in the same manner and with the same effect as commissioners to take acknowledgments of bail and affidavits may now lawfully take or do." I think it safe to assume that taking of verifications to bills and answers, and of affidavits in support of or to oppose motions for injunction, are "acts in relation to evidence" within the meaning of the above provision; and, therefore, the verification and affidavits were properly taken before such officers.

By the previous act of September 16th, 1850 (9 Statutes, 458), the signature and official seal of the notary was recognized as sufficient evidence of his official character and the genuineness of his acts; and as the act of July 29th, 1854, was supplementary to the act of 1850, the same recognition must be extended to the signature and seal of the notary under that act. See, also, *Goodyear* v. *Hulliben*, 3 Fish. 251, 254. In the present case, the jurats to the verification of the bill, and to the affidavits, all have the signatures and official seals of the notaries, and are therefore sufficiently authenticated.

Second. As to the entitling of the affidavits as in a cause pending when no such suit was in existence at the time. By an unbroken current of decisions, some of which are cited below, in England and in this country, such affidavits are not entitled to be read or used for any purpose whatever. The test, and the main ground of their rejection is, that there being no such cause in existence at the time, the affiant could not be convicted of perjury if the affidavit is false. *Rex* v. *Jones*, 1 Str. 704; *Rex* v. *Pierson*, Arch. 313; *Rex* v. *Harrison*, C. T. R. 60; *King* v. *Cole*, C. T. R. 640; 1 Dan. Ch. Prac. 891; *Humphrey* v. *Cande*, 2 Con. 509; *Haight* v. *Turner*, 2 J. R. 370; *Bronson* v. *Mitchill*, 12 L. J. R. 460; *Milliken* v. *Selye*, 3 Denio 54; *Hawley* v. *Donnelly*, 8 Paige, 415.

In *Bronson* v. *Mitchill*, two of the judges thought the entitling might be rejected as surplusage, but the majority of the court decided otherwise and the affidavits were rejected. And in some of the English cases cited, the question of rejecting the entitling as surplusage was mooted, and it was held that, even if competent in any case, it could not be done in those cases, because it would render many material portions of the affidavits meaningless on account of references to "the said defendant," &c. That is precisely the case here. It results therefore that, with the entitling retained, the affidavits cannot be read; with the entitling rejected, they are in many material portions meaningless. The affidavits must therefore be rejected.

Third. As to the verification of the bill. This is evidenced only by the jurat of the officer before whom the verification was made. The jurat is as follows: —

"United States of America, } ss.
District of Connecticut. }

"NEW HAVEN, *4th October*, 1873.

"Then personally appeared before me John A. Blake, agent and director of the orators in the foregoing bill of complaint, and made solemn oath that the same, and the allegations therein contained, are true, upon his knowledge, information, and belief.

"(Signed) GEORGE SHERMAN,

"[Notarial Seal.] *Notary Public.*"

Without this verification there is no proof of the allegations of the bill as to complainant's title to the patent in question, the novelty of the same, complainant's use and enjoyment, of the decisions of courts sustaining the same, all material to be proven on an application for a preliminary injunction. 2 Dan. Ch. Pr. 1644. The question of the validity of the verification is therefore important.

Equity rule ninety-five is as follows: "That bills in equity may be verified by the agent or solicitor of the complainant: —

"First. When the party is at the time absent from the district.

"Second. When the facts are within the personal knowledge of the agent or solicitor."

Aside from this rule (and it is doubtful if this rule can be applied to bills by corporations, as in this case), there is no rule or provision of law, by act of Congress or otherwise, prescribing the manner of verifying bills, or even requiring them to be verified at all, in any case. Beyond all doubt, however, the material allegations of injunction bills, especially in patent and copyright cases, upon which a preliminary injunction is moved, must be verified in some manner. In England, this appears to have been done by affidavit, subscribed and sworn to in the usual form (1 Dan. Ch. Pr. 392 and note; 3 Ib. 2165); and in the absence of any law or rule to the contrary, such should be the practice here. Equity Rule 90.

A practice has grown up, however, in the equity courts of the United States, and is of long standing in this district, and no doubt in most of the others, of verifying bills by the complainant, his agent, or solicitor, making oath to the truth of the bill itself, the officer administering the oath adding his jurat, or certificate of the fact, as was done in this case. And I am inclined to the opinion that such practice has been of sufficiently long standing, and of such uniformity, as to give it the authority of a rule of practice, and therefore to hold that this manner of verifying bills is competent in this court.

The certificate or jurat of the officer should show clearly and specifically that all those things necessary for the court to know and be informed of were sworn to. It should appear that the person making oath is the same person who signed the bill; and when the bill is signed by an agent or officer of a corporation complainant, or by an agent or the solicitor of the complainant, it should appear that the person made oath that he was such agent, officer, or solicitor; and when by the agent or solicitor of complainant (except perhaps in the case of a corporation complainant) it should appear that such agent or solicitor made oath to the reason for his making the oath instead of the complainant, in order that the court may see that such agent or solicitor was competent to make the oath under equity rule

nine-five; it should also appear, although perhaps this is not essential, that the person making oath made oath to his knowledge of the contents of the bill; and when he swears partly upon his knowledge, and partly upon his information and belief, it should clearly appear what portions of such contents he so swears to upon knowledge, and what portions upon information and belief.

Apply these tests to the jurat to the present bill and fatal defects are at once apparent — so apparent as to avoid the necessity of specifying them here.

It results that the motion cannot be granted as the case now stands. It will not, however, be dismissed, but it will be allowed to stand over, with leave to complainant to have its bill properly verified, and to file and serve affidavits in support of the motion within thirty days, and to the defendants to file and serve affidavits in opposition within ten days thereafter. Ordered accordingly.

COURT OF APPEALS OF MARYLAND.

[TO APPEAR IN 39 MARYLAND.]

PRINCIPAL AND AGENT. — RESPONSIBILITY OF PRINCIPAL FOR FRAUDULENT CONDUCT OF AGENT. — DAMAGES. — EVIDENCE TOUCHING GENUINENESS OF SIGNATURES. — PHOTOGRAPHIC COPIES WITH EXPLANATIONS BY PHOTOGRAPHER.

TOME v. *PARKERSBURG BRANCH R. R. CO.*

By the by-laws of a railroad company, its treasurer was made the custodian of the ledger and other books relating exclusively to the ownership and transfer of the capital stock of the company; he was required to prepare and countersign all certificates of ownership of stock and scrip that might be issued, and to receive and enter upon the proper books all transfers thereof. It was made his duty, also, to affix the seal of the company to all certificates of ownership of stock and scrip properly issued by the company, and signed by the president. Such treasurer, wishing to obtain money for his own use, fraudulently issued from the office of the company sundry certificates of stock, signed by himself, sealed with the corporate seal of the company, and having also the signature of the president, and purporting to be genuine in every respect. Upon the stock so issued, the treasurer through the agency of a broker, borrowed large sums of money, the lender not knowing for whom the money was wanted, and advancing the same solely upon the faith of the certificates, which he believed to be genuine. Two of the certificates were issued directly to the lender, and the third was issued to the broker and by him assigned to the lender. Some months afterward it was discovered that there had been a fraudulent issue of stock to a large amount by the treasurer, who soon after the discovery absconded. The company thereupon gave notice requesting the holders of its genuine stock to present their certificates and receive in exchange new certificates. Upon presentation of the above certificates by the holder thereof, in pursuance of this notice, he was informed that they were spuri-

ous, and the treasurer of the company refused to exchange them for new certificates. On suit brought against the company, by the holder of these certificates, for its refusal to exchange them for new certificates, it was held, that the defendant was liable for the fraudulent acts of its agent; and the jury in assessing the damages to which the plaintiff was entitled might allow him the amount of the money advanced on the stock with interest, or the amount of the market value of the stock at the date of the loan with interest (if they deemed it proper to allow interest), the amount allowed, however, not to exceed the amount of the money loaned with interest, if the value of the stock should be greater than the loan and interest.

Shortly after the discovery of the fraudulent conduct of the treasurer in the over-issue of stock, the directors of the company, on the 10th of August, 1870, held a meeting at which a report was made by the Finance Committee, setting out in detail the extent of such over-issue. In this report there was no mention made of one of the certificates held by the plaintiff. The plaintiff offered to read in evidence the record of the proceedings of this meeting, from the record book of proceedings of the company, having previously read, without objection, from the record of the various meetings of the stockholders and directors of the company, held prior to this meeting. The defendant objected to the admission of the proffered testimony. Held, that the proceedings of the meeting of the 10th of August were admissible, — the report of the Finance Committee, that one of the certificates of stock held by the plaintiff did not appear upon the list of "over-issues of the stock of the company," furnishing the strongest negative proof that such certificate was genuine and not spurious.

On the question of the genuineness of the signature of a Mr. Van Winkle to certain certificates of stock sued on, a witness professing to be an expert in the matter of handwriting was offered to prove that the signature to such certificates was not genuine. He stated that he had never seen Mr. Van Winkle write, nor received any letter from him, nor had he become acquainted with it in the course of business, but that his only knowledge on the subject was derived from an examination of the signatures of said Van Winkle, in the two certificate books in evidence, which had been placed in his hands by the defendant to enable him to testify, and that he had carefully examined them for five or six months, and had thus acquired a knowledge of the handwriting of Van Winkle. Held, that the witness was not competent to testify as to the genuineness of Mr. Van Winkle's signature, his opinion being derived solely from a comparison of handwriting.

On the same question, a photographer by profession and expert in handwriting, offered as a witness by the defendant, stated that he had, at the instance of the defendant, made photographic copies of the signatures of Van Winkle to the certificates sued on, and of others admitted to be genuine; that some of these copies were of the actual size of the original, and others of an enlarged size. The defendant thereupon proposed to offer said copies in evidence, to be examined by the jury, together with explanations by the witness as to the differences between the genuine and those alleged to be forged, and his opinion, derived from a comparison of those copies, as to the genuineness of the signatures to the certificates sued on. The plaintiff objected. Held, that the proffered evidence was inadmissible.

THE facts appear in the opinion.

The cause was argued before Bartol, C. J., Stewart, Bowie, Miller, and Alvey, JJ.

Messrs. *Saml. Snowden, Wm. F. Frick & I. Nerett Steele*, for appellant.

Messrs. *C. J. M. Gwinn, J. H. B. Latrobe & Reverdy Johnson, contra.*

BOWIE, J., delivered the opinion of the court.

The main question involved in this cause is the extent of the liability of private corporations for the acts of their agent, done within the scope of their employment, expressed or implied.

The inquiry is of peculiar interest, not because of any novelty of principle, but on account of its application to a class of corporations, which have multiplied with amazing rapidity in modern times, and absorbed a vast proportion of the capital and commerce of the country.

As the relation of principal and agent is common to all classes and conditions of life, the principles which govern it are of universal application.

All persons, natural and artificial, capable of entering into this relation are subject to its laws. From the humblest position of domestic service, to the highest grade of financial or commercial employment, a common principle controls its obligations.

The maxim, "*qui facit per alium facit per se*," on which it is said the whole law of principal and agent rests, is based on the instinct of natural justice, — that in all employments and business of men, those who create or appoint agents for their own convenience and advantage should be liable for their acts of omission or commission, in the course of their employment.

From considerations of policy, public corporations, such as states or municipalities, are exempt in a great degree from responsibility for implied authority, founded on the conduct of those they employ; but private corporations, like the individuals who compose them, are held to rigid accountability for the acts of those whom they have held out to others as worthy of trust.

The record contains six bills of exceptions, taken by the appellant; the first five, to the rejection and admission of certain evidence; the sixth, to the rejection of the prayers of the appellant, and the granting of those of the appellee.

The last exception presenting questions of laws, which are peculiar to and govern the case, and the preceding exceptions, such only as are incidental, we shall examine them inversely.

As the pleadings contain a summary of the facts and the issues to which the prayers apply, a synopsis of them will be a proper preliminary.

The suit was instituted on the 1st of April, 1871, in the superior court of Baltimore city, by the appellant against the appellee, for the refusal of the latter to issue to the former certain new certificates of stock, in lieu of others previously issued to and held by the appellant, and presented for renewal, in pursuance of notice requiring the holders of stock to present and renew their certificates.

The *narr.* contained six counts: the first, second, and third for refusing to renew a certificate of 200 shares, issued the 8th of April, 1870; the fourth, fifth, and sixth for refusing to renew a certificate of 350 shares, issued the 2d of October, 1869.

The gist of these several counts is referred to and traversed by the pleas.

The defendants pleaded to the first and fourth counts, that the certificates in said counts mentioned were spurious and not genuine, as the name of the president of the Parkersburg Railroad Company, upon the face of

said certificates, is not the genuine handwriting of said president. To the second and fifth counts, that in issuing the certificate mentioned in said counts, the same being spurious and not genuine, inasmuch as the name of the president is not the handwriting of the president, the agent of the said company, mentioned in said count, acted without the scope of his employment. To the third and sixth counts the defendants deny that they have prosecuted their business, in the matter of issuing certificates of stock, in a grossly unskilful and improper manner, and with want of proper care, skill, and diligence.

The defendants afterwards filed additional pleas, alleging that the certificates mentioned were issued without authority and fraudulently, and not for the use and benefit of the defendants, but for the use and benefit of the agent.

To the additional pleas the plaintiff (the appellant) replied that John L. Crawford was the treasurer and transfer agent of the defendants, and placed in sole charge of its office in Baltimore, and in possession of their books, containing certificates of stock, signed in blank by the president, and in issuing the certificates, Crawford acted in the exercise of a power conferred upon him by the defendants as their treasurer and transfer agent; that the plaintiff advanced his money upon the collateral security of the certificates without any knowledge or suspicion that Crawford, as treasurer and transfer agent, was acting fraudulently, and that the defendant is estopped from saying the certificates were fraudulently issued, &c.

For replication to the defendants' second amended plea, the plaintiff said, that whether said certificates were fraudulently issued by Crawford, without lawful authority or not, or whether they were issued for his use and not for the benefit of the defendants, or whether the defendants received any benefit, nevertheless the plaintiff was entitled to maintain his action, because Crawford, in issuing the certificates, acted within the scope of his employment as treasurer and transfer agent.

The issues made by the pleadings, briefly expressed, are as follows: —

1st. Whether the certificates of stock alleged to be issued by the appellees to the appellant were genuine or spurious?

2d. Whether they were issued by the treasurer and transfer agent within the scope of his employment?

3d. Whether the appellees conducted their business in the matter of issuing the certificates of stock in a grossly unskilful manner, and without due care and diligence?

4th. Whether the certificates were issued without authority and fraudulently by the treasurer and transfer agent?

5th. Whether the appellees were estopped by the facts and circumstances of the case from denying the authority of their agent and the genuineness of the certificates?

Some of these issues present, perhaps, questions of law as well as of fact, but all errors of pleading were waived, and it was agreed that either party might present, for the judgment of the court, any question that the facts might authorize.

The appellant's prayers, upon the hypothesis, that the facts contained in them respectively are proved, without referring to them specifically, present the following propositions substantially, viz.: —

1st. The appellee is responsible to the appellant for the amount which he has lost through the act of its agent, whether the certificates of stock upon which the loans were made have the genuine signature of the president, or whether they are forged, or whether the money went into the treasury of the appellee, or into the pockets of Crawford, *if the certificates were issued in the course of, and within the scope of his employment as agent.*

2d. That the appellee is estopped from denying the facts set out in the certificate issued by its agent, and authenticated by its seal, in the due course of his employment and within the scope of his authority.

That the corporation cannot set up the fraud of its own agent as a defence, because the act of the agent is its own act, and such defence would be relying on its own fraud.

3d. That the negligence of the appellee, in the management and conduct of its corporate affairs, contributed to the perpetration of the frauds upon the appellant, and concludes them from denying their responsibility for the acts of their agent.

The appellee's prayers negative these propositions, and are generally the converse of them.

The questions involved in them are thus epitomized in the appellee's brief: —

1st. That no recovery can be had under any circumstances, on the certificates offered in evidence, without proof of the genuineness of the signatures of the president and treasurer, and of the seal of the company.

2d. That no recovery can be had, even if the certificates were genuine, as regards the seal and signatures, and in other respects, if they were issued by Crawford for his own benefit, without authority; and that there is nothing in the evidence to estop the defendants below from setting up a want of authority.

3d. That if the said certificates gave to Crawford no right which he could enforce against the company, the hypothecation of them to the plaintiff below, his bailee, could confer no rights which he did not possess himself.

The appellant's prayers are predicated on the theory of a general agency; the appellee's on a special or limited authority.

In the very excellent compendium of Mercantile Law, by Smith, the rights of third persons against principals are very clearly and forcibly defined, as follows: —

"As far as the agent's authority extends, he has a right to bind the principal to third persons. Now his authority may, as we have seen, be either expressly given or inferred from the acts of his supposed principal. When it is expressly given, there can be no doubt as to its extent, except from the uncertainty of words employed in delegating it. When, however, it is to be inferred from the conduct of the principal, that conduct furnishes the only evidence of its extent as well as of its existence; and in solving all questions on this subject, the general rule is, that the extent of the agent's authority is (as between his principal and third parties) to be measured by the extent of his usual employment, for he who accredits another by employing him must abide by the effects of that credit, and will be bound by contracts made with innocent third persons, in the

seeming course of that employment, and on the faith of that credit, whether the employer intended to authorize them or not; since where one of two innocent persons must suffer by the fraud of a third, he who enabled the third person to commit the fraud should be the sufferer." Smith's Mer. Law, 56, 57 (London edition, 1834).

This principle is applied to cases respecting notes or bills, which, if drawn, indorsed, or accepted by a clerk who has been previously allowed to do so, bind the master, though the money never came to his use; and to sales and guarantees; in a word to every species of mercantile transaction; and whether the agent have or have not been dismissed from his employer's service, provided that the third party had no reason to be aware of the determination of his employment. *Vide Prescott* v. *Flinn*, 9 Bing. 21; *Boulter* v. *Arlesdon*, 1 Sel. 234; *Barber* v. *Gingell*, 3 Esp. 60; *Haughton* v. *Ewbank*, 4 Camp. 88; 12 Mod. 346, cited by Smith.

The American doctrine on this subject is announced by Story, in terms equally emphatic and comprehensive, viz.: —

"It is a general doctrine of law, that although the principal is not ordinarily liable (for he sometimes is), in a criminal suit, for the acts or misdeeds of his agent, unless, indeed, he has authorized or coöperated in those acts or misdeeds; yet he is liable to third persons in a civil suit, for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies *respondeat superior*, and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him, through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency." Story on Agency, 7th edition, ch. 17, sec. 452; *Penn., Del. & Md. Steam Nav. Co.* v. *Hungerford*, 6 G. & J. 291; Lord Holt's opinion in *Lane* v. *Cotten*, 12 Mod. 490; Paley on Agency, by Lloyd, 294, 301, 307; Bac. Abrid. Master & Ser. R. These principles apply as well to *private corporations* as to natural persons.

"As natural persons are liable for the wrongful acts and neglects of their servants and agents, done in the course and within the scope of their employment; so are corporations upon the same grounds, in the same manner, and to the same extent." Angell & Ames on Corps. ch. 9, sec. 310; *Albert* v. *The Savings Bank of Balto.* 1 Md. Ch. Dec. 407; *Thacher* v. *Bank of N. Y.* 5 Sand. 121; *Thompson* v. *Bell*, 10 Exch. 10 (26 Eng. L. & Eq. 536); *Bargate* v. *Shortridge*, 5 Ho. of Ld. Cases, 297 (31 Eng. L. & E. 44); *Nat. Exch. Co.* v. *Drew*, H. L. 1855 (32 Eng. L. & E. 1); *Stevens* v. *Boston and Maine Railroad*, 1 Gray, 277; *Blackstock* v. *N. Y. & Erie R. R. Co.* 1 Bosworth, 77.

These obligations spring, as we have said, from the dictates of natural justice, the policy of the law, and the necessities of society; they are

common to all civilized communities, ancient and modern, and derived mainly from the civil law. In commercial countries, where capital is centred in large corporations, whose stock is the subject of continual change by sale or hypothecation, operations which must be conducted by the agency of individuals whose powers can be ascertained only by the extent of their usual employment, the importance of maintaining these principles can scarcely be over-estimated.

It is conceded in this case that the appellees are a corporation, created by the State of West Virginia; that immediately after the reorganization of the company, it made an agreement with the Baltimore and Ohio Railroad Company, by which the latter undertook to work the Branch Road, and thereafter the management of the road became, on the part of the Parkersburg Company, simply a supervision of accounts between the companies.

"That at the first stockholders' meeting, held the 10th of May, 1865, the following directors were appointed, and continued in office by annual reëlection, until August, 1870, when Crawford's frauds were discovered:"

P. G. VAN WINKLE,
JAMES COOK,
JOHN R. MURDOCK,
GEORGE NEALE, JR.,
Of Parkersburg,
JOHNS HOPKINS,
COL. O'DONNELL,
WM. MCKIM,
C. M. KEYSER,
B. DE FORD,
THOS. SWANN,
JOHN W. GARRETT,
Of Baltimore.

Two standing committees were appointed, viz.: —

Messrs. McKim, Garrett, and Murdock, Committee of Finance; Messrs. De Ford, O'Donnell, and Cooke, Committee on the Road.

At this meeting, P. G. Van Winkle was appointed President, W. W. Van Winkle, Secretary, and John L. Crawford, Treasurer and Stock Transfer Agent.

The following by-laws or resolutions were adopted at this meeting: —

Resolved, "That the officers of this company, subordinate to the president, shall be a treasurer and secretary, who shall hold their respective offices during the pleasure of the board. The duty of the treasurer, in addition to the usual functions of such an officer, shall be to keep the ledger and other books, relating exclusively to the ownership and transfer of the capital stock of the company; to prepare and countersign all certificates of ownership of stock and scrip hereafter issued, and to receive and enter upon the proper books all transfers thereof. He shall affix an impression of the seal of the company to all certificates of ownership of stock and scrip properly issued by the company, and signed by the president, and also, to such other instruments and papers as are required by law, or the by-laws of the company, or may be directed by the board, to be under seal. He shall give bond, with security to be approved by the president, in the penal sum of ten thousand dollars, conditioned for the faithful performance of the duties of his office, during his continuance therein, and for accounting for, and paying over to his successor, all money, security, and other property, which may come to his hands by

virtue thereof. Until the further order of the board, he shall keep his office in the city of Baltimore; and in case of absence or inability to act of the secretary, shall discharge such duties of the latter as may be required by the board or president. His salary shall be at the rate of two hundred and fifty dollars per annum.

Resolved, "That the president and treasurer are hereby authorized and directed to issue certificates of ownership of stock and scrip directly, to such parties as have heretofore assented to the terms of reorganization, whether they have or have not their respective certificates of allotment, and also to those who shall hereafter so assent, in the said terms on the surrender to be cancelled of the stock certificates, bonds, and other evidences of debt of the late Northwestern Virginia Railroad Company, owned or held by them respectively.

Resolved, "That the capital stock of this company be increased by the addition of so many shares of the par value of fifty dollars each, to the amount of the capital stock of the late Northwestern Virginia Railroad Company, as may be necessary to cover the stock issued, and to be issued in redemption of the obligations, debts, and stock of the said late company, the gross amount of the stock so issued to be deemed and taken to be the cost of the works and property in the hands of this company, agreeably to the resolutions of the stockholders, adopted at an adjourned meeting held on the 24th day of May last.

Resolved, "That the seal prepared for the use of this company and now exhibited, having as a device a steamboat, locomotive, &c., with the legend, 'Parkersburg Branch Railroad Company,' be, and the same is hereby, adopted as the common seal thereof, and shall remain in the custody of the president, and shall be affixed to all certificates of stock and scrip, and all other instruments requiring a seal executed on the part and by authority of this company."

But one meeting of the directors was held between that of September, 1865, and August, 1870, viz., on the 17th of September, 1867, at which no business of importance was transacted.

It has been argued on the part of the appellee, that these by-laws conferred a special authority only on the treasurer and transfer agent, which all persons dealing with him were bound at their peril to know. This, however, is not the doctrine of the text-writers or best adjudged cases, as to private corporations. By-laws of a private corporation are generally binding upon none but its members or officers.

These they obligate upon the ground of their express or implied assent to them. Angell & Ames on Corp. sec. 359, and authorities in note.

By-laws of a public municipal corporation are regarded as public acts. *Vide Mayor, &c. of Baltimore* v. *Reynolds*, 20 Md. 1.

These by-laws or resolutions prescribe and define the powers and duties of the treasurer and transfer agent, as between the corporation and himself, and all persons having knowledge of their method of doing business. Angell & Ames on Corp. ch. x. sec. 325, 359 — citing *Cummings* v. *Webster*, 43 Me. 192; *Bank of Wilmington* v. *Wollaston*, 3 Harrington, Del. 90.

By these, "the treasurer is made the custodian of the ledger and other books relating exclusively to the ownership and transfer of the capital

stock of the company," he is authorized "to prepare and countersign all certificates of ownership of stock and scrip thereafter issued," and "to receive and enter upon the proper books all transfers thereof;" "to affix an impression of the seal of the company to all certificates of ownership of stock and scrip, properly issued by the company and signed by the president." In a word, he is constituted the executive of the corporation, with large discretionary powers. But an agent's powers (as we have seen) do not depend solely on the express letter of his instructions. "Their extent, as well as existence," as said by Paley, "are often determined by the conduct of the principal towards the agent, and measured by his usual employment."

There was no limit in this case as to the amount of stock to be issued.

It is conceded that no objection is made to the certificate on the ground that they were over-issues.

The seal of the corporation and signatures of the treasurer and transfer agent are admitted to be genuine.

The first of the appellant's and appellee's prayers are based on the hypothesis that the signatures of both president and treasurer are genuine. Yet the appellee insists, notwithstanding they may be genuine, if the jury shall find that the certificates were issued by the treasurer fraudulently and surreptitiously, for his own use and benefit and not for the use and benefit of the appellee, the appellant is not entitled to recover.

This theory denies all liability of the principal for the fraudulent act of the agent, unless that act inures to the benefit of the former; a proposition which cannot be adopted without abandoning all the principles previously cited from the text-books, supported by a long series of decisions.

Paley, in his chapter on the obligation of principals, for the neglect or fraud of their agents, after announcing the proposition, that "if a man employ an agent in the commission of a fraud, he is clearly liable for it himself," adds, "And employers are also civilly liable for frauds committed by their servants or agents, without their authority, if done in their employment," for which he cites, 1 Str. 653; *S. P.*, per Lord Ellenborough in *Crockford* v. *Winter*, 1 Campb. 127; Paley, ch. 3d, 302.

The ground of liability is not that the principal has been benefited by the act of the agent, but that an innocent third person has been damaged by confiding in the agent, who was accredited by the principal as worthy of trust in that particular business.

In the case of *Jones* v. *Perchard*, 3 Esp. Cases, 507, cited by Paley in note (o), p. 300, a sheriff was held liable for money wrongfully taken by his bailiff, under color of his office, in an action for money had and received; "but the plaintiff (it was held) need not show that the money came to the sheriff's hands."

The modern case of the *Bank of Kentucky* v. *The Schuylkill Bank*, decided by the late president, Judge King, in the court of common pleas of the First Judicial District of Pa., and affirmed by the supreme court of that State, furnishes analogies and establishes principles which will aid us much in arriving at correct conclusions in the present case.

The Bank of Kentucky, in 1835, resolved to establish agencies in New

York, Philadelphia, and New Orleans, under their by-laws relating to the transfer of stocks. The Schuylkill Bank (of which Hosea J. Levis was cashier) was appointed the agent at Philadelphia.

By the authority conferred on the Schuylkill Bank, that bank could only place on their stock ledger such shares as were originally subscribed at Philadelphia, or those transferred by warrants from the principal bank at Louisville and the agency at New York.

It was alleged, that if the Schuylkill Bank had acted faithfully as transfer agent, no one could, or would have been permitted, to transfer stock where there was no stock to his credit on the books. It was further alleged, that various persons, having no stock on the books, were permitted to transfer shares, purporting to be shares of the Bank of Kentucky, on the ledger of the agency at Philadelphia, and among others, H. J. Levis, the cashier, had transferred thirteen thousand three hundred and seventy-four shares when he had none, or any authority from those who had, whereby the Bank of Kentucky was charged with stock amounting to one and a quarter million of dollars, which they were afterwards compelled to redeem or recognize as genuine.

These over-issues were charged to have been made for the use and benefit of the Schuylkill Bank, and the greater part of the proceeds appropriated to the purposes of that bank.

The Bank of Kentucky claimed to be reimbursed by the Schuylkill Bank for the amount of the spurious issues.

The Schuylkill Bank denied the agency, or that the over-issues were made with their knowledge, privity, and consent; insisted that Levis, in his individual capacity, was such agent exclusively; and with Levis in that relation, the Schuylkill Bank had no connection.

The case was discussed under two prominent points: —

1st. That the Schuylkill Bank was, in law and in fact, the transfer agent of the Bank of Kentucky, and responsible for the defaults charged in the bill.

2d. That if the first was not sustained, the Schuylkill Bank, under the circumstances, was liable to pay over to the complainants the proceeds of the sale of the spurious stock of the Bank of Kentucky, deposited by Levis in the Schuylkill Bank.

Among other arguments for the defendants, it was insisted that the complainants' right to recover depended upon their legal liability for the frauds of their agent, and they were not liable, because the capital stock of the Bank of Kentucky was limited to fifty thousand shares, and the spurious shares were in excess of it, and the principal, much less the agent, could not enlarge the capital stock of the corporation.

3d. Because the holders of the spurious stock were bound to inquire into the authority of the agent, which required certain acts to be done. viz.: *the surrender of the old certificates*, before new certificates could be issued.

Having shown that these preliminary provisions were intended for the protection of the corporation from embarrassment between legal and equitable claimants to the same stock, and secure them for liens or claims on its stock, and referred to numerous decisions to sustain those views, the learned judge returns to the argument thus: "Who conducts the

preliminaries resulting in the issue of the new certificates? Why, the bank itself, or, what is the same thing on this occasion, its agent lawfully constituted for this purpose. The idea, that the purchaser of stock is to lose the property he has honestly paid for, because the bank has not done its duty to itself, is unreasonable to the last degree. It would seem strange, indeed, to an unsophisticated understanding, if such a notion could be invoked successfully to save the Bank of Kentucky from the results of its own misapplied confidence in a faithless agent. The true doctrine on this subject is, that where one of two innocent persons is to suffer for the tortious act of a third, he who gave the aggressor the means of doing wrong must also bear the consequences of the act. If, therefore, the Bank of Kentucky was responsible for the frauds of its agent, there is nothing in the circumstances under which the holders of the spurious stock received their certificates which exempts it from this liability."

After an exhaustive argument, in which many of the text-books and cases previously referred to are cited, the learned judge concludes that branch of his opinion in these emphatic terms: "The principal holds out his agent as competent and fit to be trusted, and thereby in effect he warrants his fidelity and good conduct in all matters of the agency." The Bank of Kentucky was then responsible for the frauds of its agent, whoever that agent was, and did no more than justice required, and law would surely have coerced when it compensated the holders of the spurious stock.

The fact that the proceeds of the spurious stock inured to the benefit of the Schuylkill Bank does not seem to have been relied on by the court; and referring to the second head, whether, supposing Levis to have been the agent of the complainants, the defendants are not bound to pay the complainants the amount received from the sale of the spurious stock, they say it is unnecessary to decide it, the decision of the first superseding the necessity of such inquiry.

A very analogous case is that of the *N. Y. & N. H. R. R. Co.* v. *Schuyler et al.* 34 N. Y. 61–78, decided by the court of appeals of New York in 1865, in which all the previous cases in that and other states as well as in England were reviewed. It is a compendium of the law as to the liability of corporations for the acts of their agents done within the scope of their employment, or resulting from negligence of the principal, amounting to "*estoppel in pais.*"

Adopting the general principle before announced, that a corporation is liable to the same extent and under the same circumstances as a natural person, for the consequences of its wrongful acts, and will be held responsible in a civil action at the suit of the injured party for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transaction may be, it declares "the incapacity to create the spurious stock would be no defence to an action for damages for the injury."

On the contrary, that very incapacity, since it would render the certificate or transfer a fraud or deceit, would itself be the cause of the injury and the basis of recovery. No court would hear the corporation assert its wrongful act was beyond its chartered limits, and therefore ineffective to charge it with the injurious consequences of fraud. But in this case, the

false certificates were issued, and the spurious stock transferred by an officer of the corporation. A corporation aggregate being an artificial body — an imaginary person of the law — so to speak, is from its nature incapable of doing any act, except through agents, to whom is given by its fundamental law, or in pursuance of it, every power of action it is capable of possessing or exercising; hence it is liable to the same extent, and under the same circumstances that a natural person is chargeable with the acts or negligence of his agent, and if the agent conducts himself fraudulently, the same principles prevail where the principal is a corporation.

From these premises, the following, among other conclusions, are reached: —

"Where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which, the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice." *North River Bank* v. *Aymar*, 3 Hill, 262; *N. Y. & N. H. R. R. Co.* v. *Schuyler et al.* 34 N. Y. 73.

As a consequence of these principles, the court held that certain defendants who had acquired spurious stock from Schuyler, although not entitled to become stockholders, were entitled to indemnity from the company for the fraudulent acts of their president and transfer agent, whose authority they were estopped from denying by the facts and circumstances of the case. 34 N. Y. Reports, 50, 51, 53, 61.

In the very recent case of *Titus* v. *The President, &c. of the Great Western Turnpike Road*, 5 Lansing, 250, 255, the corporation was held liable for money advanced to the treasurer by an innocent third person, upon spurious certificates of stock issued by the treasurer to himself, and signed by him, in conformity with their by-laws. In that case the supreme court of New York said: "The liability of the principal for such acts of its agent was distinctly affirmed in the *N. Y. & N. H. R. R. Co.* v. *Schuyler*, and in *Bruff* v. *Mali*, 36 N. Y. 200."

The cases cited by the appellees, prior in date, and in conflict with the principles announced in 34 N. Y. and 5 Lansing, are of course overruled. We do not think the case of *Swann* v. *The North British Austrn. Compy.* in the court of exchequer chamber, 46 Law Journal, 273, conflicts in principle with the cases above cited; but differs rather as to the degree of negligence which constitutes estoppel *in pais*. The broker in that case, who forged the instruments, was not clothed with a general authority to represent his principal, and conduct their business, as in the present case.

The case of the *Bank of Ireland* v. *The Trustees of the Evans' Charities*, 5 Ho. of Lords Rep. 389, relied on by the appellees, is of the same general character. The stock sought to be transferred was not that of a corporation issuing stock, of which the defaulting agent was the secretary, but stock held by the trustees in the Bank of Ireland. Grace, the secretary of the trustees, was not transfer agent of that stock, or authorized to affix the seal of his principals to any instruments. "He took advantage of his being secretary to the trustees, and thereby having the custody of

the seal." The power to order and dispose of the seal of the corporation, and the use and application thereof, was vested in three trustees; Crawford, on the contrary, had authority to affix the seal of the company to all certificates of ownership of stock, properly issued by the company and signed by the president. The doctrine laid down by that case is, "that the negligence which would deprive the corporation of the right to insist the transfer was invalid, must be negligence in, or immediately connected with the transfer itself," a position, in our opinion, not inconsistent with the facts on which the prayers of the appellant are based.

Since the argument of this cause, the case of the Queen on the prosecution of *Robson* v. *The Shropshire Union Railways and Canal Company*, in the exchequer chamber, has been reported in 8 Queen's Bench (Law Rep.), 420, 421.

This was an application for a mandamus, requiring the defendants to register certain certificates of stock held by the administratrix of an equitable mortgagee of certain shares, standing in the name of the equitable mortgagor, who was a trustee of the stock and a director of the defendants.

The queen's bench, consisting of Cockburn, C. J., Mellor, Hannen, and Quain, JJ., refused the mandamus, but on appeal to the exchequer chamber their judgment was reversed, and it was held "that the defendants are, under the circumstances of this case (as between them and the prosecutrix), the persons who must suffer for the consequences of a breach of trust of G. Holyoake (the trustee), which consequences are attributable to their giving him, or rather *perhaps negligently allowing him to obtain, he being a director, indicia* of property which he did not possess."

Numerous other authorities establish by analogy the principles above announced; among these may be cited 2 Hill, 461, the case of the *U. S.* v. *Davis*, and *Merchants' Bank* v. *State Bank*, 10 Wallace, 642. In the former, a director of the bank took a note for discount, and appropriated the proceeds to his own use; in the latter, a cashier certified that a person having no deposit, had gold on deposit; in both cases the bank was held responsible. So also in 10 Gray, 532, the case of the *Atlantic Bank* v. *The Merchants' Bank* — a bank whose teller certified a check when the drawer had no funds, was held responsible for the act of its officer.

In the case of *Lister & Supplee* v. *Allen*, 31 Md. 547, this court has adopted the language of Judge Story in his work on Agency, sec. 443, as follows: "But the responsibility of the principal to third persons is not confined to cases where the contract has been actually made under his express or implied authority. It extends further, and binds the principal in all cases where the agent is acting within the scope of his usual employment, or is held out to the public, or to the other party, as having competent authority, although in fact he has, in the particular instance, exceeded or violated his instructions, and acted without authority. For in all such cases, where one of two innocent persons is to suffer, he ought to suffer who misled the other into the contract, by holding out the agent as competent to act, and as enjoying his confidence."

"So if the principal should clothe the agent, although a mere special agent, with all the apparent muniments of an absolute title to the property in himself, the principal would be bound by the acts of the latter;

as, for example, if he should clothe him with the apparent title to property by a bill of lading of a shipment, as by making the shipment appear to be on account of the agent, or should trust him with negotiable securities, indorsed in blank, a sale or disposal thereof by the agent, although in violation of his private orders, would bind the principal, and give correspondent rights and remedies to third persons, who become *bonâ fide* possessors under such sale, or other act of disposal, against him."

The parallel between the instances above cited, in which the principal's liability was fixed, and the facts upon which the appellant's first and second prayers are based, is too obvious to require comment. If the principal is civilly responsible for the frauds of his agent, as seems to be settled by the foregoing authorities, it cannot be material what shape the fraud assumes. It would be illogical to suppose that the liability of the principal is lessened by the magnitude of the fraud — that the greater the breach of trust on the part of the agent, the less the responsibility of his employer.

Every species of "*crimen falsi*" not accompanied with force — theft, forgery, and perjury — are only frauds of a deeper dye. To exonerate the principal because the fraud of his agent amounted to a felony, would violate the reason of the rule, "*respondeat superior*," deprive innocent third persons of all indemnity, expose them to the risks of fraudulent devices, most dangerous, because most difficult to detect, and leave them without any protection, other than the fear of prosecution and punishment.

The common law, which, in some cases, suspends or merges the civil remedy against the culprit, does not, in any case, take away the remedy against those who are expressly or impliedly responsible for him.

The decisions of the highest courts of Pennsylvania and New York establish the principle that the liability of the corporation is not limited to acts within its chartered powers, done by its agents, but they are responsible notwithstanding the act is beyond its legal capacity to do or contract; hence, although the stock issued by Schuyler and Davis was spurious, that is to say false, the principals were held liable in damages to innocent third persons.

The act of Crawford in issuing stock without the genuine signature of the president is not a greater violation of the charter of the appellees than the over-issues of stock in the cases cited. Both were frauds on the respective corporations and their stockholders; the act of Crawford differs only in form.

It is essential to public welfare, that where the acts of acknowledged agents are accompanied with all the *indicia* of *genuineness*, and issued for a valuable consideration, the principal shall be responsible, whether the *indicia* are true or not. Such liability would conduce to greater vigilance on the part of the principal, greater fidelity in the agent, and greater security to all dealing with them.

It necessarily results, we think, from the foregoing reasoning and the cases cited, that the appellant's first, second, third, and seventh prayers should have been granted, and the appellee's counter proposition, viz.: first, third, fourth, and seventh rejected.

The conclusion arrived at as to the appellant's first, second, third, and

seventh prayers renders it unnecessary, in our judgment, further to discuss the prayers involving the question of negligence which has been incidentally referred to in the cases cited, as the ground of "*estoppel in pais.*" Independently of that aspect of the case, there was enough in the facts mentioned in the prayers of the appellant above enumerated, which, if found by the jury, would have entitled the appellant to recover.

The appellee's second prayer, which places the appellant in the position of bailee of Crawford, and asserts he has no other or better title than Crawford, at the time of the pledge, is founded, we think, on a misapprehension of the true relation between the appellant and appellee. It does not appear that the loan was made to Crawford, or that the certificates of stock were ever held by him; on the contrary, the loan was made to one Rich, without knowledge of the appellant, until Crawford's difficulties became public, that he was the person for whom Rich wanted the money.

To constitute the relation of bailor and bailee, there must have been evidence of title in the bailor, to the certificates in question, and a transmission of that title to the appellant, through the bailor. The agent, Rich, did not disclose his agency or borrow the money, upon any specific certificates already issued and held in the name of Crawford, but upon certificates which he procured to be issued directly to the lender, as of the date of the loan.

There was no privity between the appellant and Crawford. The appellant does not claim through him, but through the certificate issued by him as the agent of the corporation. The action is not "*ex contractu*," but "*ex delicto;*" it does not seek to enforce the contract contained in the certificate, but supposing it to be genuine, it claims damages for the non-performance of a public duty, which the corporation by its charter assumed; or if not genuine, for the loss and injury inflicted on the appellant by the fraud and tort of the agent of the appellee. As said in 34 N. Y., the fraud constitutes the cause of action, and no court would suffer a defendant to set up the fraud of himself or his agent (which is by construction his own act) as a bar to the action; otherwise, fraud would be invincible and incurable.

The measure of damages, prescribed by the modification of the court of the appellant's fifth prayer, is, as we understand that modification, the proper standard.

But that it is left to the jury to determine whether, under all the circumstances, without regard to the causes of depreciation of the stock (if any) at the time of the loan, the appellant is entitled to recover the amount of the money advanced on the stock with interest, or the amount of the market value of the stock with interest (if they deem it proper to allow interest); but in no event to allow more than the amount of the money loaned with interest, if the value of the stock should exceed said loan and interest.

The exceptions to the rulings of the court in respect to the evidence referred to in them will now be considered.

The testimony of J. L. Johnston, the rejection of which was the subject of the appellant's first exception, being supplied by the admission of the same evidence on the part of the appellee, it is unnecessary to com-

ment on its character and competency further than to say such testimony was pertinent and admissible.

The second bill of exceptions is waived by the appellant.

The third involves the admissibility of the record of the proceedings of the directors of the defendant's company, of the 10th of August, 1870.

By agreement of counsel, the record of the proceedings of the appellee's company is made a part of the record of this case. It appears from this, that at a meeting of the directors of the company, held in August, 1870, after the discovery of Crawford's frauds, a report was made by the finance committee, setting out in detail the extent of Crawford's over-issues of stock, &c., — and that one of the certificates held by the appellant did not appear upon that list.

The plaintiff offered to read the proceedings of the 10th of August (which it is presumed are the proceedings referred to in the agreement of counsel, and which are described as of August, 1870), the bill of exceptions does not state for what purpose, but the appellant argues, "That they were proper evidence to show what stock was reported to the board of directors of the defendants as fraudulent, and to let the jury see (which was the fact) that some of the stock sued upon in this case had not been so reported, they might consider that fact as some evidence of its authenticity."

The plaintiff read from the record of the various meetings of the stockholders and directors of the defendant *prior to August the 10th*, 1870, without objection; but when he offered to read the proceedings of the 10th of August, the defendant objected and the court sustained the objection.

"Books of a corporation are, at common law, regarded as public to a certain extent with respect to its members, but private with respect to strangers. A rule for a limited inspection of the documents of a corporation will be ordered by the queen's bench, provided it is shown such inspection is requisite with respect to a suit then instituted, or at least to some specific dispute or question depending, in which the applicant is interested; but in this case the inspection will be granted to such an extent only as may be necessary for the particular occasion." 2 Taylor's Evidence, sec. 1346.

Although the right of the plaintiff, as a member of the corporation, was involved in the issue, the admission of the record of the proceedings of the 10th of August could not have been resisted on that ground, as the proceedings anterior were read without objection. The right of inspection was therefore conceded. The objection must have been the want of pertinency to the issue.

This objection, we think, was not tenable. The report of the committee on finance, that one of the certificates of stock held by the appellant did not appear upon the list of "over-issues of the stock of the company," furnished the strongest negative proof that the certificate referred to was genuine and not spurious.

By art. 75, sec. 69, of the Code of Pub. Laws, power is vested in the courts, in the trials of actions at law, on motion made at the first court after the appearance court, to require parties to produce copies certified by a justice of the peace, of all such parts of all books or writings in their

possession as contain evidence pertinent to the issue, &c., in cases and under circumstances where they might be compelled to produce such original books, or answer a bill of discovery, by the ordinary rules of proceeding in chancery.

The original being before the court, the only question remaining was, whether it was pertinent to the issue and such as would have been subject to production by the modes indicated.

The circumstances in this case required, we think, that the proceedings of the 10th of August should have been submitted to the jury, and the court below erred in excluding them.

The fourth bill of exceptions was taken to the admission of the evidence of Joseph E. Paine, produced on behalf of the defendant, to prove that the signatures of the president, Van Winkle, subscribed to the certificates, were not genuine.

The witness being interrogated as to his means of knowing Van Winkle's handwriting, said he had never seen him write, nor received any letter from him, nor had he become acquainted with it in the course of business; but his knowledge on that subject was derived from an examination of signatures of Van Winkle, in the two certificate books in evidence, which had been put in his hands by the defendant, for the purpose of enabling him to testify in this case, and that he had carefully examined them for five or six months, and thus acquired a knowledge of the handwriting of Van Winkle.

The fifth exception was to the admission of the evidence of a photographer and expert in handwriting, and to the admission of photographic copies of certain genuine signatures of Van Winkle, taken by the witness, some of which were of the size of the original, and others of an enlarged size, and to the admission of his explanations, to show the differences between the genuine and those alleged to be forged, and to the admission of his opinion derived from a comparison of those copies with the originals, as to the genuineness of the signatures of Van Winkle, attached to the certificates sued upon in this case.

The plaintiffs objected to the offering of said copies in evidence to be examined by the jury, and to the examination of the witnesses in reference thereto, as stated; but the court permitted said photographic copies to go to the jury as evidence, and also permitted the witness to be examined in reference thereto.

The question presented by these exceptions, although varied in form, is substantially the same, viz.: whether the genuineness of handwriting can be established by the opinions of a witness, whose belief is founded upon a mere naked comparison of papers submitted for his examination, "*post litem motam.*"

In the case of *Smith* v. *Walton*, 8 Gill, 86, Judge Martin, delivering the opinion of this court, after adverting to the arguments in favor of the admission of evidence of comparison, and conceding it had been done in some of the American courts, declares "it is in conflict with the doctrine of the common law, as enunciated in Westminster Hall." In another paragraph he says, "We consider it as the settled rule of the English law, which in this respect we approve and adopt, that with the exception of ancient documents (an exception standing upon the necessity of the

case), signatures cannot be proved by a direct comparison of hands. By which it is meant, the collation of two papers in juxtaposition for the purpose of ascertaining by inspection if they were written by the same person." In support of these views, the remarks of Mr. Justice Coleridge in the leading cases of *Doe dem. of Mudd* v. *Suckermore*, 5 Adol. & Ellis, 730, are cited, viz.: "Our law has not during a long course of years permitted handwriting to be proved by the immediate comparison by a witness of the paper in dispute with some other specimen, proved to have been written by the supposed writer of the first. . . . . It was familiar to lawyers, that many attempts have been made to introduce this mode of proof, according to the practice of the civil and ecclesiastical laws, but after some uncertainty of decision, the attempts have failed."

On referring to the case of *Mudd* v. *Suckermore*, it will be found that the opinion of Mr. Justice Patterson is especially applicable to the case before us.

After premising that there were only two modes of acquiring knowledge of handwriting, which enabled a witness to speak in a question of handwriting, considered sufficient in law, in both of which the knowledge is acquired incidentally and unintentionally, without reference to any particular object, the learned judge remarks: "A third mode is now sought to be introduced, viz., by satisfying the witness by some information or evidence, that a number of papers are in the handwriting of the party, and then desiring him to study those papers, so as to acquire a knowledge of the handwriting, and fix an exemplar in his mind; and afterwards putting into his hand the writing in question, and asking his belief respecting it. . . . .

"The very foundation of this mode is the establishment of the fact, that the papers, from studying which the witness is to acquire his knowledge, are the handwriting of the party. Now that fact must be established either by the acknowledgment of the party, or by the information of third persons. I find no express authority that direct comparison of handwriting is admissible in evidence, but many to the contrary." 5 Adol. & Ellis, 730; 2 Steph. N. P. 1700.

Judge Taylor, in his recent work on Evidence, speaking of the former and present law of England on proof of handwriting, observes: —

"Although all proof of handwriting, except when the witness either wrote the document himself or saw it written, is, in its nature, comparison, — it being the belief which the witness entertains upon comparing the handwriting in question with an exemplar formed in his mind from some previous knowledge, — the law, until the year 1854, did not allow the witness, or even the jury, except under certain special circumstances, actually to compare two writings with each other, in order to ascertain whether both were written by the same person.

"The technical rule of the common law, which was certainly not based on common sense, and which was directly opposed to the practice of our own ecclesiastical courts, of our courts in India, of the French courts, and of the courts of many of the most enlightened states of America, was, happily for the administration of justice, abrogated by the legislature in the year just named, so far at least as related to trials at *nisi prius*." Vide 17 & 18 Vict. ch. 125, secs. 27, 103.

Hence it appears the common law rule excluding evidence by comparison, whether founded on principle or precedent, was so established in England as to require a statutory enactment to control the decisions of the courts. The evidence offered in these bills of exception, being of that character which was held inadmissible by the common law, as declared by the English jurists and our own courts, we are constrained to adhere to the rule as announced in those cases.

The testimony of the photographer comes within the same principle as that of Paine. It was offered to establish the forgery of the certificates in controversy, by comparing them with copies (obtained by photographic processes, either magnified or of the natural size) of certain signatures assumed or admitted to be genuine, and pointing out the differences between the supposed genuine and disputed signatures. As a general rule, in proportion as the *media* of evidence are multiplied, the chances of error or mistake are increased. Photographers do not always produce exact fac-similes of the objects delineated, and however indebted we may be to that beautiful science for much that is useful as well as ornamental, it is at last a mimetic art, which furnishes only secondary impressions of the original, that vary according to the lights or shadows which prevail whilst being taken. It follows from the foregoing that the judgment of the court below must be reversed and the cause remanded.

Judgment reversed, and new trial ordered.

ALVEY, J., delivered a separate opinion, dissenting in part, in which BARTOL, C. J., concurred.

CIRCUIT COURT OF THE UNITED STATES. — DISTRICT OF OREGON.

[MAY, 1874.]

RES ADJUDICATA. — FORMER DECREE. — WHEN NOT A BAR TO A SECOND SUIT.

STARR v. *STARK.*

Starr being in possession of certain lots in Portland, Oregon, filed a bill in chancery against Stark, to determine an adverse claim of title by the latter, in which the complainant, as one ground of relief, alleged title derived to himself through a United States patent to the city of Portland, and that defendant claimed title adversely under a subsequent patent to himself. And as another ground of relief, that the legal title was in defendant under his said subsequent patent; but that through certain transactions set out, complainant had the equitable right, and was entitled to a conveyance of said legal title. The court, upon motion of defendant, held that the two grounds of action were inconsistent, and could not be litigated together in the same action, and required complainant to elect upon which he would proceed, and omit the other; whereupon complainant, after excepting to the ruling and order, elected to rely on the first, and withdraw the second. A decree having been rendered in favor of complainant, on the cause of action retained,

which was affirmed by the supreme court of Oregon, it was finally reversed by the supreme court of the United States on the ground that the patent to the city was void, and the bill subsequently dismissed in pursuance of the mandate of that court. Complainant then filed a second bill, alleging the equitable title before set up in the first, and withdrawn in obedience to said order of the court, and prayed a conveyance of the legal title. Held, that the proceedings and decree in the former action are not a bar to the second action.

IN January, 1864, Addison M. Starr, and the present complainant, Lewis M. Starr, being at the time in possession of the premises in controversy, in conformity with the provisions of a statute of Oregon, filed their bill on the equity side of the circuit court of Oregon, for the county of Multnomah, against the defendant, Stark, to determine his adverse claim made under a patent. An amended bill was filed in August, 1864, in which the complainants alleged two separate grounds of relief. In the first they set up a title in themselves, relying on the title derived through a patent to the city of Portland; secondly, they set up the equitable title upon which they now rely, and claimed that Stark should be adjudged to hold the legal title derived under his patent in trust for them. They prayed that Stark's patent should "be set aside and held for naught, and that he be held to release to plaintiffs all his right, title, and interest, claim and demand, to said lots," &c. On October 28, 1864, an order was entered in the cause by said court, by which the complainants "are ordered to elect which cause of suit they will proceed upon, and to set forth the same in the amended bill to be filed, to which order, requiring the plaintiffs to elect, the plaintiffs except."

In obedience to said order the complainants elected to rely upon the patent to the city of Portland, and accordingly on November 1st filed a second amended bill, or complaint, as it is designated in the Oregon Code of Practice, in which the cause of action now relied on was omitted, and the cause of action resting upon the title, derived through the patent to the city of Portland and the fraudulent procuring of a patent by Stark, more fully set out. Issue having been taken on the complaint, and the case heard on the testimony introduced, the circuit court entered a decree in favor of the plaintiffs in pursuance of the prayer of the complaint, which decree was affirmed on appeal by the supreme court of Oregon. An appeal having been taken thence to the supreme court of the United States, that court held the patent to the city to be void, and that to Stark valid, reversing the decree of the supreme court of Oregon, and remanding the case with instructions to enter a decree directing the circuit court to dismiss the action, which was accordingly done, and the action finally dismissed in pursuance of said directions.

The defendant, Stark, now sets up these proceedings in his answer, and insists that by reason thereof the cause of action now relied on is *res adjudicata*, and the former decree a bar to further litigation.

SAWYER, J. The order of discussion pursued by counsel will be followed, and the question presented by the answer of a former adjudication first disposed of. It is not pretended by defendant's counsel that the cause of action now relied upon was, in fact, put in issue, litigated, and determined in the former action; but it is insisted that it might, and therefore ought, to have been so presented, litigated, and adjudged; and

this being the case, that the decree in that action is just as conclusive as if it had been so determined. It is conceded that the ground of relief now relied on was at first set up in the complaint as one ground of action, in connection with the cause of action which was actually tried and determined; that the court held the two causes set out to be inconsistent and incompatible, and required the plaintiffs to elect upon which cause they would rely, and omit the other; and that in obedience to this order, plaintiffs did elect, and omitted the one now set up, relying upon the other. But it is insisted that the court erred in this ruling; and although there was error, it was incumbent on plaintiffs to have it corrected on appeal; and that failing to do that, they are barred by the ruling, and that the decree is as conclusive upon the whole title as if this ground of relief had been in fact litigated and adjudged. The complainants, on the other hand, insist that the two causes of action were inconsistent, and for that reason could not be properly relied on by plaintiffs and litigated in the same action; and that the order compelling plaintiff to elect was correct. If wrong in this view, it is still insisted, that since the title now set up was not in fact litigated, and not permitted to be litigated, the proceeding in the former case is not *res adjudicata*.

It is quite clear to my mind, that the order compelling plaintiffs to elect upon which cause of action they would rely, and omit the other, was erroneous. The facts constituting the grounds upon which the plaintiffs claimed equitable relief in both cases alleged are entirely consistent with each other. Only the legal conclusions that might be insisted on could be inconsistent. It might be claimed, and was claimed by the opposing counsel, that under one patent the legal title was in the city. If that had been true, the patent to Stark would of course have been void, and a cloud on the title derived through the patent to the city, and the plaintiffs' equity, in respect to the city, rested upon the grant to the city in trust for their use and benefit under the act of Congress, as occupants of the premises in question. On the other hand, the legal title having vested in Stark under his patent, as decided by the United States supreme court, upon the same state of facts as that under which title in or through the city was claimed, the patent to the city was void, and the plaintiffs' equities, as against Stark, depended upon the additional, but consistent, acts of plaintiffs and Stark alleged in the omitted cause of action, as affecting their individual rights. There can be no good reasons, it seems to me, why the plaintiffs should not have been permitted to allege the real facts upon both theories as they existed, and have since been proved, and leave the court to draw the correct conclusion therefrom, and give such relief as the plaintiffs were entitled to receive, if found entitled to any, in accordance with the legal or equitable conclusion adopted. If the circuit court of Oregon was right in compelling plaintiffs to elect, then the judgment in the former case is not a bar to this action, because the complainant has never had an opportunity to be heard, and he is not to lose his rights for not litigating them in a case wherein the law will not permit them to be litigated. If the court was in error, it still prohibited them from litigating the claim in that action, and deprived the parties of a right by compelling them to elect one cause of action, and omit the other. In either case, without any fault of their own, they have in fact

been afforded no opportunity to be heard at all on their present cause of action. They did elect, and the wisdom of that election was vindicated by the judgment of the highest court in Oregon, which sustained the title ultimately relied on in that action, and decreed the appropriate relief; but that court also turned out to be in error, and the decree was reversed by a still higher tribunal. Shall complainant now be cut off from procuring an adjudication of his rights, because, under such circumstances, the court erroneously prevented him from having it adjudicated before? It is, undoubtedly, well settled, that wherever any matter is directly in issue, and actually determined by a court of competent jurisdiction, the determination is conclusive between the same parties and their privies, whenever the same matters again arise, even though collaterally. It is said, in *Le Guen* v. *Gouverneur et al.* 1 John. Cases 492: "The principle, however, extends further. It is not only final, as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided." And this general principle is repeated in similar language in many subsequent cases. But the language is general, and must be considered in connection with the facts of the cases wherein it is used. The case cited affords as good an illustration as any of the principle upon which the rule is founded. The principle is, that an end should be put to litigation; that parties should not litigate their rights by piecemeal; that they are bound to be diligent, and when called upon to litigate their claims they ought to present all they have to say, and that it is *negligence* to omit anything within their knowledge which might be available; and if an omission is made, the consequences must fall upon the *negligent* party. Negligence of the party himself is the main element of the principle upon which the rule is founded. Says Mr. Justice Radcliffe, in the case cited: "It is evidently proper to prescribe some period to controversies of this sort, and what period can be more fit and proper than that which affords a full and fair opportunity to examine and decide all those claims. This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention." Again (p. 495), after stating that if the rule as stated is established, he says: "The only inquiry is, whether respondents, under the circumstances of the case, would have been permitted to make a defence on the trial at law, on the ground of the fraud which they now allege?" So, in the same case, Mr. Justice Kent says: "Every person is bound to take care of his own rights, and to vindicate them in due season, and in proper order. This is a sound and salutary principle of law. Accordingly, if a defendant, having the means of defence in his power, neglects to use them, and suffers a recovery to be had against him in a competent tribunal, he is forever precluded." Ibid. 504. . . . . "All the testimony now produced was, for anything that appears to the contrary, equally within their power then as now, and yet no effort was made to produce it. . . . . They were guilty of gross and palpable neglect in thus slumbering upon this ground of defence, and must now be precluded from setting it up as a cause of equitable relief against the verdict. It is *crassa negligentia* if a party does not seek after a thing of which he is apprised, and, in law, amounts to notice. So, whatever is sufficient to put a party on inquiry is good notice in equity.

If I am not mistaken in the principles which I have laid down, their application to the case before us is direct and pointed, and they operate with irresistible and conclusive efficacy to produce the result." Ibid. 504–5. Now, what is the great principle which the learned judge so earnestly insists upon as excluding the defence, but *negligence* of the parties to avail themselves of the opportunity before afforded to bring forward their defence and have its merits determined. There had been a judgment for money recovered at law for proceeds of the sale of certain goods. Defendants then filed a bill in equity to restrain the collection of the judgment on the ground of fraud in representations as to the kind and quality of the goods, which fraud was available as a defence to the action at law, and was known to the defendants at the time, but which they did not attempt to set up, and this *neglect* is the principle upon which the former judgment is held to be conclusive. In the case now in hand this element of negligence is wholly wanting. The parties did set up this cause of action in connection with the one ultimately relied on, and sought to have it determined, but the court refused to permit them to be joined, and required the plaintiffs to elect one and omit the other, and this ruling must be presumed to have been obtained at the instance of the defendant, Stark, as it was made against the protest and the exception of the plaintiffs, duly taken, and noted in the order itself. Does it lie in Stark's mouth now, after procuring such a ruling, and forcing plaintiffs against their protest, under the order of court, to omit one cause of action, to say that plaintiffs *might* have litigated the claim in that action, and because they did not, must now be precluded? I think not. They sought to litigate it but were not permitted to do so. The opportunity was refused them. They were not in fault. Suppose Stark had been in possession and brought suit against the Starrs to quiet his title, and they had set up both grounds of equitable relief in the answer, and evidence on both issues had been received, and a decree entered in favor of the Starrs upon the city title only, the court expressly declining to pass upon the other on the ground that it was unnecessary to consider it under the view taken, and this decree had become final by affirmance, neglect to prosecute any appeal, or otherwise, would it be pretended, in another litigation between the same parties, whose rights, under the claim of title not passed upon, are in question, that the former adjudication would be a bar because it was presented and evidence taken, and *might* have been determined if the judge had seen fit to consider and decide it? Such is, certainly, not the doctrine of the authorities, as will appear by a number of cases cited in *Caperton* v. *Schmidt*, 26 Cal. 479. If it were so, the conclusiveness of the judgment would rest upon the discretion, negligence, or something else of the judge, over which the parties have no control, and not upon the diligence, good judgment, or other acts of the parties themselves.

But it is earnestly argued, by defendant's counsel, that the ruling of the court, that plaintiffs could only be heard upon one of their causes of action, and compelling them to elect upon which they would proceed, cannot affect the operation of the decree as a bar to this action; that they had a right to be heard upon every ground they had upon which to demand the relief prayed; that the refusal of the court to allow them to be

heard was error, and should have been corrected in the same case on appeal; and that it cannot be reached in a collateral proceeding in another suit to establish the same right or procure the same relief, and several authorities are cited as sustaining the proposition. There appears to me to be some confusion of ideas in this part of the argument, and a misapplication of the legal principles invoked.

The authorities cited, properly applied, seem to me to overthrow the main proposition sought to be established. The first authority cited is *Cocke* v. *Halsey*, 16 Pet. 71. In that case (page 87) the court say: "The correct legal principle applicable to such proceedings is this: That in every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper, and is binding until it shall be regularly reversed by a superior authority; and cannot be affected, nor the rights of persons dependent upon it be impaired, by any collateral proceeding. This principle has been too long settled to admit of doubt at this day, as in the cases of *Thompson* v. *Tomie*, 2 Pet. 157; *United States* v. *Arredondo*, 6 Pet. 720; *Voorhees* v. *The Bank of the United States*, 10 Pet. 473; and the *Philadelphia and Trenton Railroad Company* v. *Stimpson*, 14 Pet. 458." Now, what was the adjudication in the case under consideration? Clearly, not that the cause of action omitted under order of the court was invalid, but that the plaintiffs could only be heard in that particular suit upon one of the causes of action alleged, and that they must elect upon which they would proceed, and withdraw the other. This was, clearly, an adjudication, in the progress of the cause, which the court had jurisdiction to make, and the determination is as conclusive as any other made in the progress of the cause. It was an adjudication between the parties, at the instance and in favor of one against the other. An adjudication, not that plaintiffs could not be heard at all on that cause of action, but that both causes, on both grounds, for equitable relief, could not be heard in the same action, and that they must elect upon which they would proceed, and withdraw the other. Suppose, after making their election under the order, and proceeding upon their last amended complaint, as they did do, the decree of the court had been for the defendant instead of the plaintiffs, as it was, and the plaintiffs had appealed upon the sole ground that they had been compelled to elect and withdraw their other ground of relief, and the supreme court had affirmed the decree, holding that the two grounds of relief could not be heard in that action, that decision, whether right or wrong, would have settled the question, by a direct adjudication, that the law of Oregon would not permit litigation of the two grounds of relief in one action. The decree, in that case, would clearly not have been *res adjudicata* as to the cause of action which plaintiffs were compelled to withdraw, for the very rule invoked is, that the judgment or decree is conclusive, not only upon all matters actually litigated and determined, but upon all that might be litigated in the action; and as, by the law thus settled, the omitted ground of relief could not be litigated in that action, the case would not be within the rule invoked at all. The adjudication by the circuit court is no less conclusive. It stands unreversed on that point. Right or wrong, it is finally determined, and is *res adjudicata* between these parties, and if erroneous, cannot be reviewed collaterally in this or

any other action. The ruling has the same effect, and is as conclusive as if it had been rendered by the court of last resort. It settles the question between the parties and their privies; and so the authorities cited in principle hold. The adjudication is, that the cause now relied on could not have been litigated in the former action with the ground of relief therein actually determined. It goes no further, and this is conclusive on that point. There has, then, been no negligence on the part of the plaintiffs — no laches — no opportunity presented of which they were bound to avail themselves, conceding the determination to be erroneous. So long as the ruling did not shut the plaintiffs off from any hearing whatever, but only adjudged that they must pursue their remedy on that ground of relief in another action, they were under no obligation to have the error corrected. It left the road to another action open. It did not purport to cut them off from a hearing, and did not determine that there was no cause of action. And so long as it did not do this, it did not matter to them whether they presented that ground of relief in this or in another action. To the plaintiffs it was only a matter of convenience. It would doubtless be less trouble to pursue the remedy in another action than to attempt to correct the error in the one pending. Besides, the plaintiffs were not in a position in which they could appeal. That determination was not a final decree from which an appeal could be prosecuted. It was an interlocutory adjudication. The appealable decree was in their favor on the other ground of relief, and plaintiffs could not appeal from a decree in their favor, nor could they have errors committed against them in the progress of the cause occurring before the trial corrected on Stark's appeal. On such appeal the question would not be presented. They, therefore, had no opportunity to correct the error, had it devolved upon them to do so, in order to procure a hearing upon the cause of action which they were compelled to withdraw. It is urged by complainants' counsel that the two grounds of relief sought by the Starrs in the former suit present causes of action so wholly distinct and independent that they were not bound to litigate them in one action, even if it was admissible to do so. One cause went upon the theory that the legal title vested in the city of Portland by virtue of its patent for the use and benefit of the actual occupants, who, as to these lots, were the Starrs, and that Stark had no title at all. The relief sought on this theory was in fact to remove a cloud upon a title already good. The other cause of action goes upon the theory that the legal title is in Stark by virtue of his patent, but that, by reason of equities arising between the parties themselves, the plaintiffs had the equitable right, and were entitled to a conveyance of the legal title. The case of *Morris* v. *Stuart*, 1 Iowa, 375, seems to be directly in point in favor of complainants on this question. But whether this case is correctly decided I need not consider, for my conclusion is, that the former proceedings are not a bar to this action on the grounds already indicated.

CIRCUIT COURT OF THE UNITED STATES. — DISTRICT OF KENTUCKY.

[AUGUST, 1874.]

RIGHT OF COMMON CARRIER TO LIMIT HIS COMMON LAW LIABILITY.

BANK OF KENTUCKY v. *ADAMS EXPRESS CO.*

A common carrier who has limited his responsibility by contract is not liable for loss occasioned by a cause against which he has stipulated with the shipper, unless it arises from his own negligence or that of his agents. He cannot be held for a loss which results from an employment of the vehicles of another over which he has no control, if he has exercised reasonable care in selecting such as he might properly make use of, and the shipper has agreed to exempt him from liability in case of loss by reason of the acts of those in charge of such vehicles.

A common carrier may by contract so limit his liability as to be responsible only as an ordinary bailee for hire.

THE facts are set forth in the opinion.

Messrs. *J. M. Harlan & Barr, Goodloe & Humphrey*, for the plaintiff.

Messrs. *J. Caldwell & G. C. Wharton, contra.*

BALLARD, J. On a former day there were in this case a verdict and judgment for the defendant. At the trial the counsel for the plaintiff took several exceptions to the rulings of the court and charge to the jury, and they have now moved for a new trial, assigning for cause that the court erred in refusing to give the instructions asked by them, and in giving the instructions which were given.

The learned counsel have submitted no argument on their motion. They stand on the argument made and the authorities cited at the trial.

As both that argument and those authorities received, at the time, the fullest consideration, I think I would be justified in overruling the motion without adding to what was then said; but as the opinion then expressed by me on the main point in the case is apparently opposed to several respectable authorities, and is supposed to present a new and important question, I feel that I ought not to allow this opportunity to pass without attempting a vindication of an opinion, the correctness of which has been confirmed by subsequent reflection.

The facts in the case are substantially as follows: The Southern Express Company and the Adams Express Company are engaged each in the business of carrying money and other articles from one part of the country to another for hire, at the request of any one who offers such articles to them for carriage. They do not use in their business any vehicles of their own except such as are required to transport the articles intrusted to them to and from railroad depots, and to and from steamboat landings. They use railroads, steamboats, and the other public conveyances of the country. These conveyances are not subject to their control, but are governed entirely by the companies and persons to whom they belong. The packages intrusted to them are at all times, while on these public convey-

ances, in the care of one of their own messengers or agents. These companies are engaged in carrying by the railroads through Louisiana and Mississippi to Humboldt, Tennessee, and thence over the Louisville and Nashville Railroad to Louisville, Kentucky, under a contract by which they divide the compensation in proportion to the distance the article is transported by the respective companies. Between Humboldt, Tennessee, and Louisville, Kentucky, both companies employ the same messenger; but this messenger, south of the northern boundary of the State of Tennessee, is subject entirely to the orders of the Southern Express Company, and north of that boundary is subject entirely to the orders of the Adams Express Company.

These express companies are in the habit of charging one price when they undertake to insure the safe delivery of the articles intrusted to them — that is, when they do not modify their ordinary responsibility as common carriers, and of charging another and lower price when their responsibility is limited. The Louisiana National Bank was aware of these regulations, and had in its possession printed blank receipts, or bills of lading, showing, in the body, the conditions and exceptions upon which the companies would undertake to carry at the lower rate, and in the margin the printed blank for the rate at which they would insure. Having received a letter from the plaintiff directing the forwarding by express of the sum of $13,528.15, the bank, by its teller, filled the blanks in that part of the bill of lading which contained the conditions and exceptions, and presented it to the Southern Express Company for its signature, and delivered the package of money addressed to the plaintiff without stating who was the owner. The bill of lading was signed and redelivered to the teller of the Louisville National Bank, and forwarded by him to the plaintiff at Louisville. It does not appear that the receipt was read at the time of its delivery, or that the attention of the officers of the Louisiana National Bank was called specially to the exceptions contained in it; but, as before stated, the bank was aware of these exceptions and of the stipulations for the lesser rate of compensation.

This package was carried by the Southern Express Company from New Orleans to Humboldt, Tennessee, and there delivered to the joint messenger of the Southern and Adams Express companies. While it was in the custody of this messenger between Humboldt and the northern line of the State of Tennessee, the car in which the package was contained was precipitated through a trestle-work on the line of the Louisville and Nashville Railroad, at or near Budd's Creek, and the car and package were destroyed by fire. This was caused by the fallen locomotive, without any fault or neglect on the part of the messenger who had charge of the package.

So much of the receipt as is material to the present controversy is as follows: —

"SOUTHERN EXPRESS COMPANY,
"*Express' Forwarders.*

"No. 2. — $13,528.15. *July* 26, 1869.

"Received from the Louisiana National Bank one package, sealed, and said to contain $13,528.15, addressed 'Bank of Kentucky, Louisville, Kentucky.'"

"Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and there deliver the same to other parties to complete the transaction, such delivery to terminate all liability of this company for such damage; and also that this company are not to be liable in any manner, or to any extent, for any loss or damage . . . . of such package or of its contents . . . . occasioned . . . . by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of such other company or person."

Upon these facts the court charged the jury: —

First. That the Southern Express Company and the Adams Express Company are common carriers.

Second. That the Adams Express Company is liable for the loss of packages delivered to the joint messenger of the two companies at Humboldt, Tennessee, although the loss occur south of the northern boundary of the State of Tennessee.

Third. That if the jury believe the facts above detailed in relation to the execution of the receipt, then it, thus signed and delivered, constitutes the contract, and all the exceptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not; and the plaintiff is bound by this contract, whether it expressly authorized the Louisiana National Bank to make it or not.

Fourth. If the bill of lading contained no exception, it is clear that the defendant would not be excused because the accident occurred without its fault. It would be the insurer, and therefore accountable. But the bill of lading, among other exceptions, contained this: "That the company are not to be liable in any manner, or to any extent, for any loss or damage . . . . of such package or its contents . . . . occasioned . . . . by fire."

Now, if you believe that the package was destroyed by fire, as above indicated, without any fault or neglect on behalf of the messenger or the defendant, the defendant has brought itself within the terms of the exception, and it is not liable. It is not material to inquire whether the accident resulted from the want of care, or from the negligence of the Louisville and Nashville Railroad and its agents or not, since the uncontroverted testimony shows that the car and train in which the messenger of the Adams Express Company was transporting the package belonged to the Louisville and Nashville Railroad Company, and were exclusively subject to its control and orders. A common carrier who has not limited his responsibility is undoubtedly responsible for losses, whether occurring on vehicles controlled by himself exclusively, or belonging to and controlled by others, because he is an insurer for the safe delivery of the article which he has agreed to carry; but when he has limited his liability so as to make himself responsible for ordinary care only, and the shipper, to recover against him, is obliged to aver and prove negligence, it must be his negligence or the negligence of his agents, and not the negligence of persons over whom he has no control.

"If in his employment he uses the vehicles of others over which he has no control, and uses reasonable care — that is, such care as ordinarily prudent persons engaged in like business use in selecting the vehicles, and if the loss arises from a cause against which he has stipulated with the shipper — he shall not be liable for the same unless it arises from *his* want of care, or the want of care of *his* employés.

"Without, therefore, deciding whether or not the evidence adduced in the case tends to establish any want of reasonable or ordinary care on the part of the Louisville and Nashville Railroad Company, I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it — that is, give no more effect to it than if it had not been adduced."

The first and second instructions were not excepted to, but the third and fourth were. At the trial the plaintiff insisted that it was not bound by the terms of the receipt, because it was not shown that the attention of the Louisiana National Bank was called to them at the time, or that it expressly assented to them; but I am of opinion that there was no error in this portion of the charge. The Louisiana National Bank was aware that the receipt contained some exceptions and conditions. It accepted the receipt without remonstrance or objection, and both authority and reason demonstrate that the receipt must under these circumstances be regarded as constituting the contract of the parties. *Dorr* v. *N. J. Steam Navigation Co.* 1 Kernan, 485; *Wells* v. *The Steam Navigation Co.* 4 Selden, 375, and 2 Comstock, 204; *Grace* v. *Adams, &c.* 100 Mass. 505; *Halford* v. *Adams*, 2 Duer, 480; *York Co.* v. *Ill. Central R. R.* 3 Wallace, 107.

It is now everywhere admitted that a common carrier may limit his responsibility by express contract, and if he may make an express contract with a shipper of goods, I cannot see why the contract may not be shown by the same evidence which would establish a contract between other parties. I cannot see why a writing delivered by a common carrier to an owner of goods intended by the former to express the terms and conditions of his contract to carry, and received by the latter as such, should not constitute the contract between them.

A common carrier, it is true, is bound to carry all articles within the line of his business upon the terms and conditions imposed by law, if the shipper shall so demand. He has, however, a right to charge in proportion to the risk assumed by him. It is upon this ground the authorities hold, that unless his responsibility is modified by express contract, his undertaking to carry is upon the terms and conditions which are imposed by law. But when he has undertaken to carry at a less rate than he would have a right to charge, and would charge, if he undertook to carry only upon the conditions imposed by law, and has by his receipt delivered to the shipper stipulated for a reasonable limitation of his responsibility, and the shipper has accepted the receipt without objection, the latter is as much bound by the contract thus made as any other party would be.

The correctness of the propositions contained in the remaining portion of the charge to which exception was taken may, I think, be demonstrated in two ways: —

First. By the contract between the bank and the express company

it was agreed that the company should not be responsible for any loss or damage of the package which should be occasioned by fire. The loss of the package was occasioned by fire; hence the carrier, by the terms of the contract, is not responsible. It is not pretended that the contract was violated by using the cars of the Louisville and Nashville Railroad Company to transport the messenger and the package, or was violated in any other respect. It follows, therefore, that if the company is liable at all, it is not so by virtue of the contract, but in spite of it.

The contract, however, does not attempt to exempt, nor could it have exempted, the express company from loss occasioned by the neglect of itself or its servants; but when it is sought to charge the company with neglect, it must be such neglect as it is responsible for upon the general principles of law.

Now, upon those principles, no one is responsible for damage occasioned by neglect unless it be the neglect of himself or his servants or agents. But the facts stated show that neither the company nor its servant was guilty of any neglect. It follows that the defendant cannot be charged on this account. Though the defendant used the Louisville and Nashville Railroad to transport its messenger and the package, the railroad company was not, in any legal sense, the servant of the defendant. The defendant had no control over the railroad company or over its servants. The railroad company was no more the servant of the defendant than it is of any passenger whom it transports. It was no more the servant of the defendant than is the hack or cab the servant of him who hires it to transport him from one part of the city to another.

Second. All the authorities agree that when a common carrier has, by special contract, limited his responsibility, "he becomes, with reference to that particular transaction, an ordinary bailee — a private carrier for hire," or, "reduces his responsibilities to those of an ordinary bailee for hire." *York Co.* v. *Central R. R.* 3 Wallace, 107; *N. J. Steam Navigation Co.* v. *Merchants' Bank*, 6 Howard, 382; *Railroad Co.* v. *Lockwood*, 17 Wallace, 357; 1 Am. L. T. R., N. S. 21.

I prefer the latter form of stating the proposition, because it is less misleading. I do not think that a common carrier, by entering into a contract limiting his responsibility, changes his character. He still remains a common carrier, with his responsibility limited in respect to the matter embraced in his contract, to that of an ordinary bailee for hire. The authorities are equally clear that an ordinary bailee for hire is bound to only ordinary diligence, and responsible only for losses and injuries occasioned by negligence or want of ordinary care. The defendant did by special contract limit its responsibility, and neither it, nor its servant, the messenger, is chargeable with any neglect or want of care. The loss of the package was occasioned by fire. The contract provides that the defendant should not be liable for a loss so occasioned, and as neither the defendant nor defendant's servant was wanting in care, it follows that it is not responsible for the loss.

Suppose the package had been lawfully intrusted by the Louisiana National Bank to a private person to be carried for hire, and delivered to the plaintiff, and it was contemplated by the parties that such person would transport the package and himself by the railroads, which, it was

contemplated, the defendant would use, and the package had been lost under the same circumstances that the package delivered to the defendant was lost, would it for a moment be contended that such private person would be responsible?

Suppose, again, that a person should deliver to his friend, who contemplated coming from New Orleans to Louisville by the ordinary modes of travel, a watch, to be carried and delivered at the latter city, and that while such private carrier, without reward, was proceeding on his way in one of the cars of the Louisville and Nashville Railroad Company, the car should, by the gross carelessness of those having charge of it, be thrown from the track, and the watch in charge of the carrier, without any neglect on his part, destroyed. Is it conceivable that such carrier would be responsible for the loss? To hold that he would be responsible would not only violate the plainest principles of law, but would shock the common sense of mankind; and yet, not only the private carrier for hire, but the private carrier without reward, is responsible for the loss of a package intrusted to him, under the circumstances supposed, if the defendant is responsible for the loss of the package claimed in this case.

The private carrier for hire is responsible for losses and injuries occasioned by want of ordinary care on his part or on the part of his servants; and a private carrier without pay is responsible, if not for want of ordinary care, certainly for gross neglect. It cannot be maintained with the least show of reason that the Louisville and Nashville Railroad was any more the servant of the defendant in transporting the package sued for in this case than it is the servant of the carrier for hire, and the carrier without hire in the cases supposed, and if these last are not responsible for the neglect of the servants of the railroad company, it is impossible to conceive that the defendant is responsible for such neglect.

The counsel for the plaintiff attempt to escape this conclusion by insisting that, though the defendant limited its responsibility, it still remains a common carrier, and that such carrier is responsible, not only for any want of negligence of himself and his servants, but for the negligence of any agency which he may employ in his business.

This proposition is misleading. It is not strictly correct to say that a common carrier is responsible for the negligence of any agency in his business, or even for his own negligence, or that of his servants, in the sense in which his responsibility is distinguished from the responsibility of another person. A common carrier is bound to deliver goods intrusted to him unless prevented by the owner, the act of God, or the public enemy. He is, as the law terms him, an insurer for the safe carriage and delivery of goods, subject only to the exceptions above mentioned. If he does not deliver goods intrusted to him, he is responsible, not because the goods were lost by his neglect, or the neglect of a servant, or by the neglect of some agency which he employed, but because he insured their delivery. His responsibility is wholly independent of the neglect of any one. If goods delivered to him to be carried are lost while in his, or his servant's custody, or while in the custody of some other person who is not his servant, he is equally responsible, not because he is liable upon any principle of law for the negligence of any person who is not his servant, but because he is bound by law to carry and deliver safe all goods delivered to

him unless prevented, as before stated, by the owner, the act of God, or the public enemy. If he has limited his responsibility by special contract, and the loss has been occasioned by the cause excepted in the contract, then the owner, in order to charge him, must show that though the loss arose directly from the cause excepted, that cause itself was occasioned by the neglect of the carrier. But when a public or private carrier is sought to be charged with a loss occasioned by his neglect, when neglect is the foundation of the plaintiff's claim, I am not aware that he is liable for any negligence, except upon the same principles, and under the same circumstances that any other person is liable. I am not aware that he, more than any one else, can be made responsible for the negligence of persons who are not his servants.

Undoubtedly the defendant did, notwithstanding its contract, continue to be a common carrier; but its responsibility was limited to that of an ordinary bailee for hire. Now, an ordinary bailee for hire is responsible for only ordinary care, and liable for the neglect of himself or his own servants, and not for the neglect of persons over whom he has no control. Consequently he is not responsible for a loss occurring under the circumstances presented in this case. If it be admitted that the common carrier has by his contract limited his responsibility to that of an ordinary bailee for hire, then it cannot be consistently insisted upon that he shall be held liable as a common carrier who has made no express contract. To admit the contract, and to deny any effect to it, is too much for one proposition. The proposition of counsel, reduced to its essence, is simply this: that though the defendant has, by special contract, limited its responsibility to that of a private bailee for hire, it is still responsible as a common carrier. A proposition involving so obvious a contradiction cannot require further exposure.

But obvious as the fallacy and error contained in the counsel's proposition appear to me, the proposition itself seems to be supported by the decision of the supreme court of California in the case of *Hooper* v. *Wells, Fargo & Co.* 27 California, 11; by the supreme court of Minnesota in the case of *Christenson et al.* v. *American Express Co.* 15 Minnesota Reports, 270; and by the learned editor of the American Law Register, in his note to the former case. Am. Law Register, November, 1865, p. 30.

In the first case the carrier made a contract stipulating that he would not be responsible except as forwarder. The court construed the contract as limiting the responsibility of the carrier to that of a forwarder — that is, of an ordinary bailee for hire — but they held the carriers responsible for a loss occurring on a tug or lighter which plied between the shore and an ocean steamer, occasioned by the negligence of the managers of the tug, although they were not subject to the control or orders of the express company.

In respect to the responsibility of forwarders, the court say: "They are not insurers like carriers, but they are liable for losses of goods while in their custody, resulting from negligence of themselves, and those they employ in their business of forwarders."

The correctness of the first part of this proposition cannot be disputed, nor do I question the correctness of the latter part, if by "those whom they employ in their business of forwarders," the court mean those who

are the forwarders' servants, and subject to their control and orders. The court further say, the responsibility of a forwarder is the same as that of a warehouseman; and "if a warehouseman, instead of using his own warehouse, and employing his own subordinates, should, for a stipulated sum paid to the owner, use in his business the warehouse of another person who employs and controls the subordinates, there can be no doubt that he would be liable for a loss of the goods intrusted to his care, occurring while in his possession, and resulting from the negligence of such subordinates, although not under his control."

If by the words "intrusted to his care," the court mean to suggest a case where the warehouseman has a contract to keep the goods in his own warehouse, I entirely concur in the proposition stated. But if they mean that a warehouseman, who violates no contract by removing the goods of his customer from his own warehouse into that of another prudent warehouseman, is responsible for a loss of the goods resulting from the negligence of the subordinates of such other warehouseman, I cannot assent to it.

Suppose a warehouseman's warehouse should be destroyed by fire, it would be his duty to remove such of the goods of his customers as were saved to the warehouse of some other prudent person, and it cannot be insisted that he would be responsible for the loss of goods occurring there, resulting from the negligence of servants of the latter warehouseman.

If a warehouseman contract to keep goods in his own warehouse, and he should remove them — in violation of his contract — to another warehouse, I suppose he would be liable for all losses there occurring, just as a bailee who hires a horse to go to a particular place is responsible for loss or injury to the horse, should he drive or ride him to a different place, and the horse be lost or injured in the prosecution of such other journey.

Again, the court say: "The fact that the defendants made use of various public conveyances, their messenger with the treasure travelling a part of the way by stage, a part by steam-tug and lighters, and a part by ocean steamer, makes no difference as to their liability. For defendants' purposes, the managers of these various conveyances were their agents and employés."

If, as seems to be conceded, it was contemplated by both the plaintiff and defendants that the defendants would not use in their business their own vehicles, but the conveyances of others, not at all subject to their control or management, and that in the use of those other conveyances the defendants did not violate their contract, I cannot admit that the defendants, who, by the admissions of the court, were liable only as ordinary bailees for hire, were responsible for losses occasioned by the negligence of the managers of those conveyances. I cannot admit that the managers of those other conveyances were, in any legal sense, their agents and employés. The relation of master and servant, principal and agent, does not and cannot exist where the master has no control over the servant, and the principal no control over the agent.

The court further say: "The defendants had the means of holding the proprietors of those various vehicles used in their business of expressmen responsible to them, had they chosen to do so. If they did not take the proper means to secure themselves, it was their own fault."

But I cannot see how any argument can be drawn from this to show that the defendants were responsible. Every bailee or depositary may hold any one responsible for destroying or injuring goods in his possession, but it cannot be maintained that he is responsible for such destruction or injury unless he by his negligence contribute to the same. Besides, the plaintiff had his remedy against the proprietors of those other conveyances which occasioned the loss (see the *N. J. Steam Navigation Co.* v. *Merchants' Bank*, 6 Howard, 382); and it might be retorted "that if he did not take the proper means to secure himself, it was his own fault."

In the Minnesota case, it was stipulated that the carrier "was not to be held liable for any loss or damage, except as forwarders only, or for any loss occasioned by the perils of navigation and transportation." The goods were received at New York, and were to be delivered to Christenson & Brother, Mankato, Minnesota. When the goods reached St. Paul, they were placed by the carrier on board the steamboat "Julia," a boat belonging to the Northwestern Union Pacific Company, and managed entirely by its officers and servants, to be transported to Mankato. The goods remained in charge of the carrier's messenger. The boat at the time of the accident was strong, and in good condition. The carrier was guilty of no want of care in selecting the "Julia" to transport the goods, but on the way the "Julia" was, through the carelessness of its officers and managers, run against a snag and sunk, whereby the goods were damaged.

The court say that the carrier is not exempt from the loss by reason of the stipulation in its bill of lading, that "it was not to be held liable for any loss or damage except as forwarders," because, they say: "In our opinion . . . . the effect claimed for this clause of the receipt by the defendants is inconsistent with and repugnant to the scope and intent of the result, viewed as a whole, and in connection with the fact showing the defendants' real character and mode of doing business."

In other words, the court held that the defendants were common carriers, and that this clause of their receipt did not modify their liability at all. If the court was correct in this, it is indisputable that this clause did not exempt the carrier from responsibility for the loss claimed.

In respect to the other exceptions, "perils of navigation and transportation," the court says: "The exception does not excuse the carrier for negligently running into perils of the kind mentioned. The proper construction (of such words) is analogous to that which is put upon the words 'perils of the sea' in bills of lading. While thus it would seem very proper to hold that a snag in one of our western rivers is a peril of navigation, as appears to have been done in Tennessee, if a vessel is wrecked upon one through the negligence of the carrier, or of those whom he employs . . . . the carrier is not absolved. Under such circumstances the loss is properly attributed to the agency of man, not to a peril of navigation."

Here, again, we have the same fallacies and misleading propositions which have been exposed in a former part of this opinion. The sinking of a boat by running on a snag in one of our western rivers is undoubtedly a "peril of navigation." It is none the less a peril of navigation though it occur by the fault of the person navigating the boat. It is wholly misleading to say that it is a peril of navigation when it results

from accident and without fault, and that it is not a peril of navigation when it results from negligence. When goods are lost by reason of such peril, occasioned by the negligence of the carrier, the carrier is responsible, not because the goods were not lost by an excepted peril, but because he has brought about the peril through his own carelessness or negligence. He is made responsible for his negligence, not because he is a common carrier, but because he is *guilty* of negligence, and has occasioned loss thereby.

In the books which treat of common carriers, only those carriers are treated of who use their own conveyances; hence it is we often find it stated that the exception, "perils of the sea," or "perils of the river," included in the carrier's bill of lading, does not include losses arising from what would be generally understood to be "perils of the sea," when occasioned by the negligence of the servants of the carrier. In such case, the carrier being the owner of the vessel in which the goods are carried, and being responsible for its careful navigation, it is not material in effect whether it is held that a loss arising from an excepted peril, brought about by his negligence, is not a peril of navigation within the meaning of the bill of lading, or that the carrier is responsible for a loss occasioned by the negligence of his servants; but it is better and more correct to place the liability in such case on the latter ground, because to place it on the former is misleading.

Certainly, as the court say: "The exception does not excuse the carrier for negligently running into perils, ... nor shall he be heard to set up his own negligence to excuse him from responsibility." But, in the case before the court, no negligence was imputed to the carrier. He did not attempt to set up his own negligence to excuse himself from responsibility. He set up that by the contract he was not to be liable for losses arising from the perils of navigation, and he showed that the loss did arise from a peril of navigation, without any fault on his part. He was not responsible for the negligence of the managers of the boat, as I have before shown, because he had no control or authority over them; and as he could be held responsible in the case only for negligence, it would seem he was not liable at all. I think that the court was misled by the definition of "perils of navigation" which it found in the books.

Clearly, that is none the less a "peril of navigation," or a "peril of the sea," because it is attributable to the agency of man. The very case which is generally used to define and explain what is a "peril of the sea" is that of a collision brought about by negligence. If a carrier's vessel should collide on the sea with another vessel, through the fault wholly of the latter, it is everywhere admitted that he would not be responsible for a loss arising from such collision of goods which he was carrying under a bill of lading that exempted him from responsibility for loss arising from "perils of navigation," or "perils of the sea;" and yet, undoubtedly, the collision in such case is attributable to the agency — nay, to the negligence — of man.

I have a profound respect for the opinions of the learned courts which I have here noticed, but I think that they are opposed to the general current of authorities, — that they are founded on fallacious and misleading propositions, and that they disregard the well-settled principles of law.

The motion for a new trial is overruled.

SUPREME COURT OF ILLINOIS.

[TO APPEAR IN 63 ILLINOIS.]

ELECTION. — DEPRIVING A FEW PERSONS OF ELECTIVE FRANCHISE. — DONATIONS TO INFLUENCE VOTE. — POWER OF COMMON COUNCIL OVER POLLS. — POLL-BOOKS AS EVIDENCE. — STATUTE CONSTITUTIONAL IN PART.

SUPERVISORS OF KNOX COUNTY v. *DAVIS.*

On bill in chancery by a citizen and voter of the county, who was also a tax-payer, filed in behalf of himself and all others of the county interested in the question, against the board of supervisors, to impeach the election returns and purge the poll-books of illegal votes cast at an election to determine whether the county seat should be removed, it was objected on appeal that the suit could not be maintained by a private citizen, but should have been brought by the attorney general or state's attorney on behalf of the public. Held that, from the long practice in this State allowing such suits to be brought by individuals, this court could not reverse the rule, especially as no such objection was made in the court below.

Article 6, *section* 1, *of the constitution of* 1848, *declared that every white male citizen, above the age of twenty-one, who had resided in the State one year next preceding the election, should be entitled to vote at such election; and every white male inhabitant, of the age aforesaid, who resided in the State at the adoption of the constitution, should have the same right to vote; and then provided that no citizen or inhabitant should be entitled to vote except in the district or county in which he should actually reside at the time of such election. The election law of* 1861 *provided that no person should be entitled to vote at any general or special election unless he should have actually resided in the election precinct thirty days immediately preceding such election; and the charter of Galesburg, which regulated elections in that city, required six months' residence in the city and thirty days in the ward, preceding an election, to entitle the citizen to vote. Held, on bill to contest an election for the removal of the county seat of Knox County, that the fact that some legal voters under the constitution were deprived of their right of suffrage under such laws did not render the election void; but that if the laws were restrictions on the right of suffrage, it was a wrong to the elector who was deprived of his vote, for which he had a complete remedy against the judges of election.*

A statute which directed a vote to be taken in Knox County, on the question of removing the county seat from Knoxville to the city of Galesburg, also authorized the city and individuals to raise and secure funds requisite for the public buildings, and declared the subscriptions and donations made for that purpose valid and binding in case the vote should be in favor of the removal. On a contest of an election held under such law, it was contended that this law was unconstitutional, in holding out inducements in the shape of a bribe for votes in favor of the change. Held, that if the law was unconstitutional, it was so only so far as to render the subscriptions and donations void, and no further; that the balance of the law being constitutional, the election under it was not void, and that the courts had no power to relieve against the effects of the inducements which may have operated favorably to the removal.

On the contest of an election for the removal of a county seat, it was urged that the election was void, because no registry of the voters of the county had been taken. Held, that the general registry laws of the State had no application to elections of this character.

In the same case the common council of Galesburg required the polls within the city to be opened at eight o'clock A. M., *and kept open until midnight of the day of this election, and this was urged as a fraud. Held, that as under the general laws of the State the judges of election were empowered to keep the polls open until twelve o'clock at night if deemed necessary, and as the common council had the general power to regulate elections in the city, they might make this discretion compulsory; and that, in the absence of proof of an evil intent, no fraud could be presumed, but rather a desire to afford all an opportunity to vote.*

Where it appeared, on the contest of a vote for the removal of a county seat, that the judge and clerk of the election in a town had acted fraudulently in registering the votes as they were keeping the lists, and in making fraudulent returns, and that they knowingly allowed illegal votes, and many persons to vote several times, and even minors to vote; and where the vote returned was double the vote ever cast before in the town, and the evidence showed that heavy frauds were practised, the judge and clerk participating therein, the court below rejected the poll-books and returns from such town for all purposes, except to show that an election was held, leaving it to be shown by proof who in fact voted and how such votes were cast. Held, that the court did not err in rejecting the books and returns on account of the fraud.

Although there may be some fraudulent voting at an election in a town, yet, where the officers conducting the same are not participants in it, but endeavored to hold the election according to law, their returns are primâ facie evidence of all they contain, subject, however, to be corrected by proof; but where their returns are successfully impeached for fraud in them, they are unworthy of credit, and are evidence of nothing except that a poll was opened.

Although a part of a statute may be in conflict with the constitution, and therefore void, yet the whole statute will not be pronounced void if the other provisions are complete in themselves, and may be executed without regard to the obnoxious portions.

THIS was a bill in chancery, by George Davis, in the circuit court of Knox County, against the board of supervisors of Knox County and others, to impeach the election returns and purge the poll-books of illegal votes cast at an election for the removal of the county seat of Knox County. The venue was changed to McDonough County, where a decree was rendered, finding that a majority of the legal votes cast was for removing the county seat of Knox County from Knoxville to Galesburg. The record is very voluminous, and the conclusion of facts from the evidence, so far as relate to the points discussed, will be found in the opinion.

Messrs. *Craig & Harvey*, Messrs. *Egan & Temple*, and Messrs. *Beckwith, Ayer & Kales*, for the appellants.

Messrs. *McKenzie & Williams*, and *Mr. T. G. Frost, contra.*

Mr. Justice WALKER delivered the opinion of the court.

This was a suit in equity, brought by appellees, in the circuit court of Knox County, against the board of supervisors, to impeach the election returns and to purge the poll-books of illegal votes cast at an election to determine whether the county seat should be removed from Knoxville to Galesburg. The bill alleges that the apparent majority against removal is composed of fraudulent votes, and that when the illegal and fraudulent votes shall be deducted, there will be a decided majority in favor of removal; and prays that the court may declare, by decree, that the election did result in favor of removal of the county seat to Galesburg. The

venue of the case was afterwards changed to the McDonough circuit court. The case was heard in that court, and the relief asked was granted; and the case is brought to this court, and a reversal asked, on various grounds.

It is first urged that the decree should be reversed because the suit was not instituted in the name of either the attorney general or the state's attorney of the circuit; that a private individual has no power to inaugurate such a proceeding. In support of the objection, numerous decisions of other states are referred to, as well as the practice in Great Britain. We are not disposed to doubt that such is the practice in other jurisdictions, but in this State a contrary practice has prevailed, unchallenged, for many years, and in a considerable number of cases.

The first of these cases arose under the constitution of 1848, in this court, and was *The People ex rel.* v. *Marshall*, 12 Ill. 891. That was an information, asking the court to compel the circuit judge to hold court at a place which the general assembly had endeavored to abolish as a county seat by an act passed by that body. It declared the county itself should be abolished, and the territory attached to another county. The relation was by a private person, who simply alleged that he was a citizen and a voter of the county, not even alleging that he had any business to be transacted in the court. The information was not in the name of the prosecuting attorney, nor does it appear that he consented that the proceeding might be instituted, nor does it appear that he was or acted as an attorney in the case, and still the relief was granted.

The next case was that of *Turley et al.* v. *The County of Logan*, 17 Ill. 151. That was a case involving the removal of the county seat. At the election the vote resulted in favor of removal, and a number of private citizens filed a bill to prevent the county officers from erecting county buildings at the new location. The case was tried in the court below, and was considered in this court on the legal propositions presented by the record, and no exceptions taken to the mode in which the proceeding was commenced, although the state's attorney neither joined in the bill, gave leave to file it, nor appeared as counsel in the case.

The next was the case of *The People ex rel.* v. *Warfield*, 20 Ill. 159. It was an application for a writ of *mandamus*, and although the writ was refused, it was on the ground that one Carnes, a citizen and tax-payer of the county, had filed his bill to contest the result of an election to remove the county seat, and the court of chancery having acquired jurisdiction, this court would not interfere whilst that suit was undetermined in that forum.

The next case was *Robinson* v. *Moore*, 25 Ill. 135. It only decided that the question as to the place where a county seat was located could only be settled in a direct proceeding, but not collaterally.

The case of *The Board of Supervisors* v. *Keady*, 34 Ill. 293, was a bill in chancery, filed by private citizens of the county, to prevent the board of supervisors from taking further steps for the removal of the county seat, in pursuance of a vote of the people of the county. On the hearing in the circuit court, a perpetual injunction was decreed, and on a hearing in this court, the decree was affirmed, on the ground that the vote was had before the law under which it was held had taken effect. We, however, in that case, said we desired to be understood as not expressing any

opinion as to the mode in which the question was brought before the court. We also, in that case, referred to several adjudged cases which hold that such a proceeding must be by some officer who represents the people.

In the case of *Boren* v. *Smith*, 47 Ill. 482, there had been an election held to determine whether the county seat of Pulaski County should be removed to Mound City. On a canvass of the vote, a certificate was given that the election had resulted in favor of removal, and a private person filed a bill for an injunction to restrain a removal. Neither the attorney general nor state's attorney was a party or attorney in this proceeding. The case was heard in the circuit court, and was brought to and tried in this court. In that case, it was urged that the court below could not entertain jurisdiction of a bill in chancery for the purpose of correcting the polls and returns of the officers, to obviate the effects of fraud, accident, or mistake; but this court held that equity would take jurisdiction, and, when necessary, afford relief. An application of this kind is unlike the contest in an election for an office, as in that class of cases the statute has provided the manner of contesting, and the remedy is complete at law. Hence, the case of *Moore* v. *Hoisington*, 31 Ill. 243, has no application to the present case.

The case of *The People ex rel.* v. *Wiant*, 48 Ill. 263, was an application for a writ of *mandamus* to compel the county treasurer to remove his office to the town of Wheaton, to which town it was claimed the county seat had been removed by a vote of the citizens of the county. The attorney general or state attorney's name did not appear in the proceeding as party or attorney, but, nevertheless, the court entertained jurisdiction, issued an alternative writ, and tried the case on the return. And in that case, as in *Warfield's case*, the relief was refused, on the ground that a bill in chancery was pending in the circuit court, where, the court having jurisdiction, full and complete justice could be done.

Whilst it is true, in none of these cases was the question presented whether such a bill might be filed by a citizen of the county, still the right was tacitly recognized, and has been understood by the profession as the settled practice. It is true, in the case of *The Board of Supervisors* v. *Keady*, *supra*, the practice was doubted, and authorities were referred to announcing a different rule; but, nevertheless, the court heard and determined the question as though the suit had been instituted by the attorney for the State. The practice of so filing bills in these cases has obtained unchallenged so long, and in such a number of cases, that we feel that we would be unwarranted now to wholly reverse the practice. Parties, on the faith of what has been understood to be the settled practice, have instituted and prosecuted this suit at large expense. It has necessarily been attended with much delay, and at no step in the progress of the case, from its first inception until it reached this court, has any objection been made to the manner in which the suit was brought. Under such circumstances it would be harsh to overrule the practice, and tax complainant with heavy costs, when he had every reason to suppose, as all others did, that his course was fully warranted by long and uniform practice in our courts. Again, it is the practice of the court, where no objection is made to the jurisdiction of the court below, not to entertain the objection when raised for the first time in this court, unless it be in cases where chancery could

under no circumstances have jurisdiction of the case. *Stout* v. *Cook*, 41 Ill. 447; *Dodge* v. *Wright*, 48 Ill. 382; *Hickey* v. *Forristal*, 49 Ill. 255. Even if the better practice required the suit to be brought by the attorney for the people, still, in accordance with these decisions, as the question was not raised in the court below, it cannot be in this court.

We, then, must hold that, although it might have been the better practice to require bills in such cases to be exhibited by the attorney of the State, still, if not so brought, the defendant should have objected by a demurrer in the court below, or be considered as having waived the objection.

It is next urged that the election was void because the law regulating the manner in which it should be conducted required it to be held in the several towns by the same officers and governed by the same rules as the elections in such towns are held for town officers, and in the several wards of the city of Galesburg by the same officers and governed by the same rules as elections in the city for its officers. The act of 1861, art. 5, sec. 9, of the township organization, declares that no person shall be a voter at a town meeting unless he is qualified to vote at a general election, and has been for the preceding thirty days a resident of the town where he offers to vote; and the 12th section provides that any person who is not a legal voter shall be liable to a fine of $100, or imprisonment not exceeding six months, or both, who shall vote at a town election. The charter of the city of Galesburg declares that no person shall vote at a city election unless entitled to vote at state elections, and has been a resident of the city six months preceding the election, and an actual resident of the ward in which he offers to vote ten days next preceding such election. The general laws of the State (Sess. Laws 1861, p. 268) provide that no person shall be entitled to vote at any general or special election unless he shall have actually resided in the election precinct thirty days immediately preceding such election, and declares that if any person not qualified shall vote at such election, on conviction he shall be confined in the penitentiary for any term not less than one nor more than five years.

The 7th article, section 5, of the constitution of 1848, provides "that no county seat shall be removed until the point to which it is proposed to be removed shall be fixed by law, and a majority of the voters of the county shall have voted in favor of its removal to such point." Article 6, section 1, of the same instrument, declares that every white male citizen above the age of twenty-one, who has resided in the State one year next preceding the election, shall be entitled to vote at such election, and every white male inhabitant of the age aforesaid, who resided in the State at the adoption of the constitution, shall have the same right to vote; "but no citizen or inhabitant shall be entitled to vote except in the district or county in which he shall actually reside at the time of such election."

It is insisted that these constitutional provisions secure to every elector the right of suffrage, that cannot be limited or abridged by the general assembly; that the enactments which superadd thirty days and six months' residence, as additional qualifications, are all repugnant to this constitutional provision, and are void. But, conceding them to be unconstitutional and void as preventing a free election, does it follow that this and all other elections held under these laws are void? If so, no elective

officer in the State has been constitutionally and legally elected since the passage of the act of 1861. If this election was void, then all persons holding or claiming to hold such offices have been usurpers since that time. To give such an operation to this provision of the constitution would be anomalous, and perhaps fraught with disastrous consequences. If these are restrictions on the right of suffrage, it is a wrong to the elector, for which he has a complete remedy against those who, under a void law, deprive him of the right. And it may possibly be that the judges of election have disregarded these provisions and permitted every legal voter to exercise the right, notwithstanding these limitations; but even if they have refused the right, we cannot, in the absence of fraud, hold that it could affect the result of the election.

No one, we presume, would ever contend that because the judges of election, in one or a number of cases, in the different precincts of the county, should violate the constitutional guaranty of free elections by illegally and wrongfully refusing to receive an occasional vote, therefore the election would be void; and in that case the freedom of the election would be as fully disregarded as in this, where comparatively but few voters have been deprived of their rights. To give the effect contended for to these provisions would most effectually prevent the election of most if not all officers. If simply the refusal to receive a legal vote should be held to be a violation of the freedom of the election, so as to render it void, but few offices would be filled, and the majority would be thus indefinitely deprived of their choice by the wrong decision of a question about which men might well differ. Constitutions are made for the organization of government, that the people may have protection to life, in the enjoyment of their civil and political rights, and in the possession and enjoyment of their property; and such instruments, to accomplish the purpose of their adoption, must have a practical operation. The constitution and laws do not in terms, and we think do not in spirit, require that where an inconsiderable number of electors have been deprived of their rights to participate in an election, it shall be held void, and to so hold would defeat the very purpose of holding elections.

Had the law attempted to exclude entire precincts, wards, or political divisions from participating in the election, then a more serious and important question would have been presented for determination; but if that question should ever be presented, it will then be considered and decided.

It is next urged that the law authorizing the election is unconstitutional, because it authorized the city of Galesburg and individuals to raise and secure funds requisite for the public buildings, and the subscriptions and donations made for the purpose to be valid and binding, in case the vote should be favorable to removal, and void if otherwise; that when such a fund was raised, it operated largely and unduly upon the voters of the county to induce them to vote for removal; that many were probably thus induced to vote for the change who would have opposed it had the expense for the purpose fallen on the county by taxation; that the law and the subscriptions under it gave those favorable to the removal a great and unjust advantage in the election; and that the law operated in the nature of an offer of a bribe for votes in favor of removal, and for that reason, the election should be regarded as inoperative and void.

If this law is unconstitutional, as suggested, it is only to the extent and no further than to render the subscriptions and other donations inoperative. The remaining portion of the law is, so far as we can see, strictly in conformity with the fundamental law. Because the law may be unconstitutional in one of its provisions, it does not follow that the entire law must fail. Strike out this provision, and all of the other provisions could be executed as effectually as if it was retained; and when that is the case, the law must stand.

Even if it was conceded that the legislature had no power to authorize such subscriptions, and that by doing so it may have operated favorably to removal, we are at a loss to discover how we can relieve against its effect. Suppose the two houses had passed a joint resolution requesting the electors to vote in favor of removal, and the proposition had been carried, could any one contend that such action, although manifestly outside of their duty, would defeat the operation of the law? We think not. Or suppose the general assembly had in the act provided for erecting the county buildings from funds in the state treasury, could it be said that would have rendered the election void? We are unable to see that this provision of law, whether constitutional and valid, or repugnant to the organic law and void, can, in the remotest degree, affect the legality of the election held under the law. The judicial department cannot say that because this provision may have induced some of the electors to cast their votes in favor of removal, therefore, the election must be regarded as void because of legislative influence on the voters of the county. That body is vested with large and important functions, only controlled by constitutional limitations, and neither of the other departments have any power to control their action, so long as they act within the scope of their power; and we cannot declare this election void, even if this provision had the effect claimed.

It is urged that this election was held without a registry of the voters of the county having been taken, and that for that reason the election cannot be sustained. This question was before us in the case of *Boren* v. *Smith*, *supra*, where it was held that the general registry laws of the State had no application to elections of this character; and we see no reason for changing the decision there announced.

It is next urged that the common council of the city of Galesburg, under the general power to regulate elections in the city, had required the polls to be opened at eight o'clock in the forenoon and kept open until midnight on the day of this election; and from this action of the common council, it is urged that fraud in this election should be inferred. We fail to see that the common council transcended their power in the adoption of this ordinance. Under the general election laws of the State, the judges are empowered, if they deem it necessary, to keep the polls open until twelve o'clock at night. The judges have this discretionary power, and if they should exercise it, we could not infer fraud therefrom; and the law invested the common council with the power to make it compulsory, and having done so, we will not hold that it implies a fraudulent design. We will, in the absence of proof of an evil intent, presume the common council were actuated by a sense of duty in affording all the voters of the city ample time and opportunity of exercising the right to vote for or against the proposition.

We now come to the consideration of the question as to the action of the court below in excluding the poll-books of the town of Knoxville on the ground that the judge and clerk had acted fraudulently in registering the votes as they were polled, in keeping the lists, and in making fraudulent returns, and leaving appellants to prove by other evidence the number who did vote at that poll against removal of the county seat. We think the evidence shows, beyond all controversy, that stupendous frauds were committed, and that the judge and clerk of the election at that place were engaged in and parties to the fraud; that, instead of using all reasonable and proper means to keep the ballot-box pure and uncorrupted, they were active participants in its pollution; that persons were permitted by them to vote many times during the day; that mere boys were permitted to vote, as also persons not legal voters; that persons were permitted to vote under assumed and fictitious names, and even the farce of receiving the vote of a dog was perpetrated; and finally, when the polls were returned, showing a vote of over 1,500, when at no previous election had there ever been polled at that place much, if any, more than half of that number. And the vote of Knox township was thus returned at over half of the population of the town, as shown by the United States census taken more than a year afterwards.

Again, the moderator of the election has absented himself or absconded since this proceeding was instituted, so that his evidence could not be had; and the town clerk would not swear that the poll-list had not been changed — that ballots had not been put in the box and the certificate altered since the election; and he claimed the privilege of not answering, lest it might lead to his crimination. We think the evidence conclusively shows that there were such frauds on the part of the officers in conducting this election, that to receive the poll-books and certificate of the officers would be to perpetuate the fraud; that it would lead to error and obstruct justice; that truth would be stifled instead of being eliminated by its reception as evidence; that when a community and its officers enter into such a scheme of fraud, they should not, by their election returns thus made, be permitted to reap the same advantage as if honesty and fairness had dictated their course.

All the evidence on the point considered, we are clearly of the opinion that the poll-books and certificate are impeached and are utterly unworthy of credit, and should only be received to prove that a poll was opened at that place, and that citizens did vote at that poll, on that day, on the question of removal of the county seat.

The poll-list in this case having been impeached and wholly discredited as unworthy of credit, by reason of the fraud of the officers of the election in receiving and certifying the poll-lists, what course shall be pursued in regard to the vote of that precinct? The supreme court of California, in the case of *Knowles* v. *Yates*, 31 Cal. 82, held, where the election was held at a place different from that fixed by the county authorities, it was such a fraud as required the rejection of the poll-book and certificate, and in the count of votes none of those cast at that place could be received; that, whilst it is the duty of the courts, as far as can be done, to protect the elector in his rights, the interest of the public should not be sacrificed for the purpose of avoiding a wrong to the individual voter; that where

the people select election officers, and they disregard their duty, and aid in committing frauds on the election, the voter must be responsible for the conduct of the officer, to the extent of losing his vote, although he may be innocent of fraud.

But the court below adopted a different rule. On the hearing, the chancellor received the poll-lists and return only as evidence that an election was held in the town of Knoxville, and rejected it as wholly unworthy of belief as to other questions. The court then permitted appellants to show, by extrinsic evidence, how the various votes were in fact cast, and counted the votes thus proved as legal and proper. This is certainly all that appellants have a right to claim. A court of equity, in such a contest as this, cannot close its eyes to the fact that the election officers were perverting their powers, and were using their official position to commit a fraud on the election, and cannot give effect to the return, and cannot go further than to count the votes as they are proved to have been given. In this the court below certainly went as far as equity can sanction; and appellants have received fully as much as they can claim, if not more than the strict legal rules could award to them.

The court decided correctly in holding that no votes could be counted from that precinct but such as were proved by satisfactory evidence that they were actually cast, and whether for or against removal. This afforded the means of fully establishing how every legal voter in the town actually cast his vote; and it at the same time cut off illegal votes, repeaters, and all frauds on the ballot. It is true that it involved labor and expense; but the officers whom these same votes had placed in position to hold their elections perpetrated the fraud, and it is the misfortune of their constituents, and they should not be permitted even to make such proof if it were not that others have an interest in the question of where the county seat shall be permanently located. Were it an ordinary election, perhaps a different rule should prevail, as such permanent results would not be so likely to ensue, and as such contests are not settled in courts of equity, and the law relating thereto has made no such provision.

It is, on the other hand, insisted that there were similar frauds at the various voting places in the city of Galesburg. On a careful examination of the evidence, we fail to find that such is the fact. That there was fraudulent voting at each of these polls, is true; and it is a matter of regret that our General Assembly have been compelled to impose such heavy penalties to prevent a wrong that they must have regarded so common as to only be checked by such severe punishment. But there is no evidence that the election officers at Galesburg boarded up the window so as to be unable to see each person when he presented his ballot, only leaving a small opening through which it could be passed, as was done by the officers at Knoxville. There is no evidence that they permitted persons whom they knew to repeatedly vote during the day, nor that they permitted mere boys to vote, or persons to do so under fictitious names whom they knew; and when called on to testify and to produce the poll-lists, they did so freely, fully, and fairly; nor did they refuse to answer questions, lest it might lead to their crimination; and they testify that they, in all things, endeavored to hold the election fairly and to discharge their entire duty, and believed they had, and knew at the time nothing to the contrary.

Their conduct seems to have been candid and straightforward, answering all questions without hesitation. In all respects, their conduct stands in bold contrast with that of the officers who held the election at Knoxville. We fail to find evidence that can or should impeach their returns, and the court below decided correctly in receiving them as *primâ facie* evidence of all they contained, subject to be corrected by proof.

We now come to the consideration touching the sixty-three persons of foreign birth, who, on proceedings in the county court, had obtained naturalization papers. The act of Congress of the 14th of April, 1802, provides that aliens may be admitted to citizenship by the supreme, superior, district, or circuit court of some one of the states, or of the territorial district court of the United States, or a circuit or district court of the United States. It further declares that every court of record, in any individual state, having common law jurisdiction, and a seal and clerk, or prothonotary, shall be considered as a district court within the meaning of the act. Then, does our county court, as organized, come within this provision? Or, does it require a court which, from its organization, has a more extensive and enlarged jurisdiction?

The county court has a seal, a clerk, and is a court of record, and to that extent answers the requirements of the act of Congress; but has it the common law jurisdiction required? It has been, so far as we know, considered by the profession that the act required not only common law, but general common law jurisdiction, and hence it is believed but few of our county courts have assumed to exercise such jurisdiction. It is conceded that the court has but a limited common law jurisdiction. The settlement of estates, although a large and highly important jurisdiction, is not, strictly speaking, a common law jurisdiction. It, in Great Britain, was committed to the ecclesiastical courts. That kingdom, whence we draw our common law, has not, until it may be recently, committed the probate of wills, the grant of letters testamentary, or of administration and the settlement of estates, to any of their common law courts. Hence, the jurisdiction of the settlement of estates by our county courts is not a common law jurisdiction, but is strictly statutory. It is true that such courts have conferred upon them a limited jurisdiction in the action of debt and assumpsit, when those actions lie at common law, where a guardian or an executor or administrator is a party, plaintiff or defendant, and in assigning dower to widows of deceased persons.

So far as we have been able to find, in looking through our statutes, this was the extent of the common law jurisdiction of our county courts. Thus it will be perceived that it is limited as to the character of the common law actions, and the amount of the recovery, as well as to the persons who may sue. Hence, it is limited as to the action, the person, and the amount, and is in no sense general in its common law jurisdiction.

It was said, in the case of *Mills* v. *McDade*, 44 Ill. 194, "that a fair and reasonable construction of the act of Congress requires us to hold that only a court of record for general, and not for special purposes, was intended to be embraced. That act has not declared that a court of record for some purposes shall be vested with such jurisdiction." So, for the same reason, we must hold that where, although a court of record, if it only has common law jurisdiction in three common law actions, and two

of them limited in amount, it is not such a court as was contemplated by the act of Congress. Where it declared that it must have common law jurisdiction, it cannot be that it was designed to confer the power on a court having a seal and clerk which could only exercise the smallest fragment of common law jurisdiction. The court intended to be embraced was one that exercised a general, although it might be a common law jurisdiction, limited as to the sum or amount in controversy, and it may be where some kinds of actions are excluded.

We are therefore of opinion that the county court did not have jurisdiction to admit these persons to citizenship, and their votes should have been rejected.

As far as we have been able to determine from an examination of this voluminous record, the court below did not err in votes it counted in favor of removal. But rejecting the sixty-three votes of these persons not naturalized, there was still a majority of over one hundred in favor of removal. In canvassing the vote, we are of the opinion that the court below allowed in the count all the votes at Knoxville which were proved to have been cast against removal.

An examination of the entire record has failed to disclose any error for which the decree should be reversed, and it is therefore affirmed.

Decree affirmed.

Mr. Chief Justice LAWRENCE took no part in the decision of this case.

DISTRICT COURT OF THE UNITED STATES. — WESTERN DISTRICT OF WISCONSIN.

[MARCH, 1874.]

NATIONAL BANK. — JURISDICTION.

MAIN v. *SECOND NATIONAL BANK OF CHICAGO.*

A national bank can only be sued in the district where it is located. The Practice Act of 1872 *does not provide otherwise.*

MOTION to dismiss for want of jurisdiction, the defendant being a national bank, located and doing business in the city of Chicago, State of Illinois, and service having been had upon John P. McGregor, the cashier, who was found within the district.

Tenneys, Flower & Abercrombie, for the motion, cited *Crocker* v. *Marine National Bank of New York*, 101 Massachusetts, 249; *Cook* v. *State National Bank of Boston*, 50 Barbour, 339.

H. S. Orton & W. F. Vilas, contra.

HOPKINS, J. In the argument filed in support of the motion it is claimed that a national bank cannot be sued in any court *out* of the judicial district where it is "located" or "established." I do not think the general banking law admits of such an interpretation. The 8th section

of the act of June 3, 1864 (13 U. S. Statutes at Large, 101), provides that such corporations "may sue and be sued in any court of law and equity as fully as natural persons."

I do not think the provision in the 57th section of the act restrictive of this general authority, but that it was intended rather to enlarge the operation of the 21st section of the judiciary act of 1789 (1 U. S. Statutes at Large, 78), and to confer upon such organizations the right to sue and be sued in the federal courts in the district where located by a citizen of the same district; and I fully concur with Judge Blatchford's views expressed in his opinion in the *Manufacturers' National Bank of Chicago* v. *Baack*, 8 Blatchford C. C. R. 137, that the banks organized under the general banking act of Congress are to be deemed residents or inhabitants of the state and district where they are "located" and "established." The provisions of the act referred to by him are sufficient to warrant that conclusion, and if this were the only point I should have no hesitancy in overruling the motion.

But there is a question arising under the provision of the 11th section of the Judiciary Act of 1789, which, as interpreted by numerous decisions of the federal courts, seems to me to constitute an insuperable objection to the plaintiff's right to prosecute this defendant in this court.

That section provides that "no civil suit shall be brought before either of the courts (circuit or district) against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

That the defendant was not an "inhabitant" of this district when this suit was commenced, is too plain for discussion. The remaining question is, Was the defendant *found* "here at that time?"

The defendant, as before stated, was "located" at Chicago; that was its *habitation;* that does not move around with the person of its officers; the corporation is not migratory. It could not of its own will, and without authority of law, change its location to this State. Therefore, I must hold that this court has no jurisdiction over this defendant; that it was not "found" here within the meaning of that statute. In the case of the *Bank of Augusta* v. *Earle*, 13 Peters, 519, the court say, in speaking of locality of corporation: "It must dwell in the place of its creation; it cannot migrate to another sovereignty." This, it is true, was said of a state bank, but the same may with equal propriety be said of a national bank. They have a local habitation, an office, and place of business within a state or district as much as a state bank. Justice Nelson, in *Day* v. *Newark India Rubber Manufacturing Co.* 1 Blatchford, 628, and in *Pomeroy* v. *New York & New Haven R. R. Co.* 4 Blatchford, 120, examined this question very fully, and arrived at the conclusion in both cases, notwithstanding there was a statute of the State of New York authorizing service to be made upon officers of such foreign company within the State, which would give the state courts jurisdiction of the corporations, that the corporations were not "inhabitants" of the State, and were not "found" there because their officers and agents resided or came into that district; that the officers were not the corporations, and the corporations were not therefore *found* within the district.

This is a jurisdictional question, and "state laws can confer no authority on this court in the exercise of its jurisdiction, by the use of state process, to reach either person or property, which it could not reach within the meaning of the law creating it." *Toland* v. *Sprague*, 12 Peters, 328.

I do not think the Practice Act of June 1, 1872 (17 U. S. Statutes at Large, p. 196), changes the rule. That relates to the practice and proceedings in suits against parties who may be prosecuted in the federal courts, but does not profess to enlarge their jurisdiction or to extend it over persons or cases not before within the cognizance of the court. As said in *Toland* v. *Sprague*, 12 Peters, 300, "the act of Congress, adopting the state process, adopts the form and mode of service only so far as the *persons* are rightfully within the *reach* of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts."

I think the same construction should be given to the act of 1872 above mentioned, and so construed it does not relieve the case of the question of the *habitat* of this defendant being without the district, and not therefore subject to the process of this court.

The motion is therefore granted and this suit dismissed.

SUPREME COURT OF ILLINOIS.

[TO APPEAR IN 63 ILL.]

NEGLIGENCE. — INJURY TO PERSON WALKING ON TRACK AT NIGHT BY "DARK TRAIN."

INDIANAPOLIS & ST. LOUIS R. R. CO. v. *GALBREATH.*

In an action against a railroad company to recover damages alleged to have been sustained by the plaintiff through the carelessness and negligence of defendant's servants and agents in running a train of cars upon their track, it appeared that while, in the night-time, the plaintiff was walking on the track in a village, at a place where the same was so used, without objection, by all classes of persons, he was overtaken and struck by an engine without any head-light, running at a high rate of speed, there being no bell rung or whistle sounded to indicate the approach of the train, and the plaintiff hearing or seeing nothing of it until he was struck. Held, that the negligence of the plaintiff in walking on the track, if it was negligence, was but slight when compared with the gross and criminal negligence of the defendant in so running a "dark train" at a high rate of speed through the village without signalling its approach.

APPEAL from the circuit court of Coles County; the Hon. James Steele, Judge, presiding.

Messrs. *Wiley & Parker*, *B. W. Hanna & C. B. Steele*, for the appellant.

Messrs. *O. B. Ficklin & James A. Connolly*, *contra.*

Mr. Justice BREESE delivered the opinion of the court.

This was an action on the case, to recover damages alleged to have been sustained by appellee by the carelessness and negligence of appellant's servants and agents in running a train of cars upon their railroad, by means of which appellee was so seriously injured as to render the amputation of both his legs necessary.

That the injury was inflicted by one of the trains of appellant is undeniable; that appellee was guilty of some degree of negligence is certain; but the point is, was the negligence of appellant so much in excess of that of appellee as to justify a verdict in his favor?

This depends upon the fact, which train of appellant inflicted the injury.

It appears there were two freight trains running east through Charleston, the scene of the accident, on the night of the 24th of December, 1869: one in charge of Fife, as conductor, and Long, as engine-driver, and known as No. Nine; the other resembled a freight train, having an engine tender and caboose only, of which Winn was the conductor, and Nicholson, engine-driver, this latter passing Charleston an hour or so in advance of No. Nine.

It is in evidence that appellee left Nowling's stable, to go towards the railroad, about twenty minutes past ten o'clock of that night, and in about five minutes thereafter, while walking on the track to reach the Parker Crossing, on the way to the place north of the railroad where he had hitched his team, he was struck by a locomotive having no head-light and sounding no bell or whistle. He was going east, the same direction the train was proceeding, and of course had his back to the engine. He saw nothing and heard nothing until he was struck by the pilot of the engine, and most miraculously escaped instant death by holding on to an iron rod with which the pilot was provided. His hold on the rod failing, he fell by the side of the track near the rails. About twelve o'clock of the same night, No. Nine passed along the road, and according to the statement of the driver, Long, he discovered appellee sixty or seventy feet ahead of the engine, lying lengthwise about the centre of the track, his head to the west, a little south of the centre of the track, his face to the south, and his knees drawn up. He says he had shut off steam before he saw the object, and was going about four miles an hour; he reversed the engine as soon as he could after he saw him. After he did this, he looked out again, and the pilot was shoving the body along; could see his body, and saw his legs after the forward truck had passed over him and he had rolled out into the ditch. This train had a head-light at the time, and the usual signals were given, and no negligence is perceptible with which to charge it.

That a "dark train," with no head-light, and without giving warning, did pass along this road at a high rate of speed, and over the very spot where the accident occurred, and about the time it occurred, is conclusively established by the testimony of several disinterested witnesses, who, from the positions they were in, were obliged to see it, and whose course to Ashmore, eight miles east of Charleston, is proved, where it arrived at the proper time, without a head-light.

It is true, the driver of this engine, Nicholson, says he had a head-light

all the way from Mattoon to Terre Haute, and so says the conductor, Winn, but that it was not lighted. Appellee testifies, and so do James White, Susan White, and Mattie Patterson — and they are fortified by the testimony of William Marsh and Mary Gibbons, for it is undeniable — that the train they saw at Ashmore when they got off the passenger train, which was followed by this "dark train," and in close proximity, was the same "dark train" to which the witnesses named testified. It could be no other. This train had no head-light, and we think the jury were fully justified in coming to the conclusion that this train inflicted the injury.

Upon the point of comparative negligence, for this is raised in the case, admitting appellee was guilty of negligence in walking upon the track, it was but ordinary negligence, the track being used for that purpose, without objection, by all classes of persons. Appellee was, perhaps, somewhat under the influence of the whiskey he had drank that day and evening, but it does not appear he was thereby rendered incapable of properly disposing of himself. He states he was walking on the track to reach the Parker Crossing, and had not been on it two minutes before he was struck, and that the engine doing the injury had no head-light, and gave no warning of its approach. This was negligence of the grossest kind; it was wilful, criminal negligence, for which the company must be held responsible.

The evidence presents a case peculiarly within the province of a jury to pass upon. It was a fair question for them to decide: Did train No. Nine inflict the injury, or was it the "dark train?" If the former, and appellee had placed himself in a state of intoxication upon the track, that train, having a head-light, and giving the required warning, would be exonerated from blame. The case would be like that of the *Illinois Central Railroad Co.* v. *Hutchinson*, 47 Ill. 408, in which the company was held blameless. If the latter, the negligence of the company was so gross as to amount to criminality.

Taking all the instructions given by the court for both parties as the charge of the court to the jury upon the law of the whole case, we fail to see anything objectionable in them as a charge, though one instruction, the fourth, seems to omit all reference to the care observed by appellee. This defect is supplied by the other instructions, as well those given for the plaintiff as for the defendant.

We are satisfied, on the whole evidence, the jury did not err in accepting appellee's theory of the case. It was their peculiar province to determine, from the evidence, which theory was the most reasonable, if they have been properly instructed as to the law.

Much stress is laid on the circumstance that appellee had been drinking very freely on that night, but when the evidence is closely scanned it will be seen that he was, at no time on that night, intoxicated, or so much under the influence of ardent spirits as to be incapable of self-control. His condition was fully considered by the jury, and they must have been satisfied he was using due care in using the railroad track, a practice so general, especially where the track is not fenced, as to be unchallenged. They must have been satisfied, also, that this "dark train" did not display a head-light, or sound a whistle, or ring a bell, all which was a duty imposed by law.

It cannot be tolerated that these dangerous machines shall be allowed to run at a high rate of speed through towns and settlements at dead of night, giving no warning of their approach and crushing the life out of all living animals in their way. If appellee was negligent in his use of the railroad, it was what everybody else did, and was so slight when compared with that of appellant, as to have but little significance.

Appellee was peculiarly unfortunate, first, in being stricken by this "dark train" and left in the road, then his limbs crushed by another train, which, so far as we can see, used all the usual precautions to prevent injury to his person. For this, the jury have awarded but slight compensation for the loss of both legs.

We cannot disturb this verdict or judgment, and must affirm the same.

Judgment affirmed.

LAWRENCE, C. J., and MCALLISTER and THORNTON, JJ., dissented.

DISTRICT COURT OF THE UNITED STATES. — DISTRICT OF MASSACHUSETTS.

[SEPTEMBER, 1874.]

BANKRUPTCY. — THE ACT OF 1874 APPLICABLE TO PENDING CASES.

IN RE GRIFFITHS.[1]

The ninth section of the amendatory bankruptcy act, approved June 22, 1874, is applicable to cases which were pending at the time of its passage.

LOWELL, J. The question presented by the register's certificate is whether section nine of the act of June 22, 1874, applies to pending cases.

[1] The view taken by Judge LOWELL in this case has been also announced by Mr. Justice MILLER, in a case heard at a term of the circuit court of the United States for the Eastern District of Missouri.

The following is Judge BLATCHFORD'S opinion, alluded to by Judge LOWELL, in which the contrary view is declared to be the true one: —

DISTRICT COURT OF THE UNITED STATES. — SOUTHERN DISTRICT OF NEW YOK.

IN RE FRANKE.

BLATCHFORD, J. The bankrupts were adjudged such, as copartners, by this court, on the 28th of June, 1872, on a petition filed against them. They appeared and filed a written consent to adjudication. A warrant was issued, and the first meeting of creditors was held on the 2d of August, 1872. On that day thirty creditors proved their debts. An assignee was elected by the vote of twenty-seven of these. On the 19th of September, 1872, the bankrupts filed their sworn schedules of debts and assets. On the 23d of July, 1874, and not before, they filed a petition for discharge. By the 24th of July, 1874, forty-four creditors had proved their debts. The hearing on the petition for discharge was fixed for the 18th of August. No creditor appeared to oppose a discharge. The assignee has received moneys belonging to the estate to the amount of $9,996.22. It is not shown that the assets of the bankrupts are equal to fifty *per centum* of the claims proved against their estate, upon which they are liable as principal debtors; nor is it shown that the assent, in writing, of a majority in number and value of their creditors to whom they have become liable as principal debtors, and who have proved their claims, was filed at or before the time of the hearing of the application for discharge. According to the said schedules, all of the debts were contracted after the 31st of December, 1868. Notwithstanding these facts, the register certifies that the bankrupts have "conformed to their duty under the act of Congress entitled, 'An act to

It was settled by several decisions in Massachusetts that such amendments of the law did affect all cases. *Ex parte Lane*, 3 Met. 213; *Eastman* v.

establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867,' and the acts amendatory thereof and supplemental thereto, and have conformed to all the requirements of the said act and the acts amendatory thereto."

The first section of the act of July 27, 1868 (15 U. S. Stats. at Large, 227), amends the second clause of the thirty-third section of the said act of 1867, so as to read as follows: "In all proceedings in bankruptcy, commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty *per centum* of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall become liable as a principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for discharge." By the first section of the act of July 14, 1870 (16 Ib. 276), it was declared that the provisions of the second clause of the thirty-third section of said act of 1867, as amended by the first section of the said act of 1868, shall not apply to those debts from which a bankrupt seeks a discharge, which were contracted prior to the 1st of January, 1869.

The requirements of the act of 1868 apply to "all proceedings in bankruptcy" commenced after the 1st of January, 1869, whether the petition be one filed by, or one filed against the debtor. Under those requirements, the right to discharges in this case is not shown. But the certificate of the register implies that it is supposed that, because this is a case of compulsory or involuntary bankruptcy, discharges may and must, under the act of June 22, 1874, be granted, without a compliance with the requirements of the act of 1868.

The ninth section of the act of 1874 provides as follows: "In cases of compulsory or involuntary bankruptcy, the provisions of said act (the original bankruptcy act of March 2, 1869), and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid such *per centum* of his debts, or as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty *per centum* of the claims proved against his estate, on which he shall be liable as principal debtor, without the assent of at least one fourth of his creditors in number, and one third in value, and the provision in section thirty-three of said act of March 2, 1867, requiring fifty *per centum* of such assets, is hereby repealed."

The provisions of the act of 1868 were in amendment of the thirty-third section of the act of 1867.

What is the effect of the ninth section of the act of 1874? Was it intended to apply to cases commenced before the date of its passage? It does not repeal anything except the provision "requiring fifty *per centum* of such assets," and the twenty-first section of the act of 1874 repeals only such acts and parts of acts as are inconsistent with the provisions of the act of 1874; that, in the present case, it should be necessary to comply with the requirements of the act of 1868. Does the repeal of the provision "requiring fifty *per centum* of such assets," make the act of 1868 inapplicable to the present case?

The ninth section of the act of 1874 must be construed in connection with the other provisions of the same act. The language of the ninth section is general. It says: "In cases of compulsory or involuntary bankruptcy," and "in cases of voluntary bankruptcy." This language is satisfied by applying it to cases to be commenced after the passage of the act of 1874. That is the natural meaning of such language. It is not to be construed as applying to cases commenced before and pending at the time of the passage of the act of 1874, unless the intention to have it so apply is apparent from the act. The intention to have other provisions of the act of 1874 apply to cases commenced before its passage is manifested and declared by that act, and if such intention is not declared in regard to the provisions of section nine, and if those provisions can have proper scope without applying them to cases commenced before the passage of the act of 1874, and especially if to apply those provisions to such cases would be inconsistent with the intent manifested by all the provisions of the act of 1874, considered together, then the inference is proper, that it was not intended that those provisions should apply to cases commenced before the passage of the act of 1874. The twelfth section of the act of 1874, in amendment of the thirty-ninth section of the act of 1867, in regard to cases of compulsory or involuntary bankruptcy, declares that the provisions of such twelfth section shall apply to cases commenced after the 1st of December, 1873, and prior to the passage of the act of 1874, as well as those commenced after its passage. So, too, the seventeenth section of the act of 1874, which prescribes proceedings for a composition with creditors, prescribes them for all cases of bankruptcy now pending or to be hereafter pending."

Under the act of 1874, in cases of compulsory or involuntary bankruptcy, commenced after its passage, one fourth in number and one third in value of the creditors of a debtor must

Hillard, 7 Met. 420; *Re Bartlett*, 8 Met. 72; *Eddy* v. *Ames*, 9 Met. 585. But as the law has been pronounced to be otherwise in relation to this statute in an able opinion of Judge Blatchford's, I feel bound to give briefly my reasons for agreeing with the earlier decisions.

Section nine says, in substance, that in cases of compulsory bankruptcy the provisions of the former laws requiring the payment of a certain proportion of debts, or the assent of a certain number of creditors, as a condition of a bankrupt's discharge, shall not apply; but if otherwise entitled, join in a petition against him or he cannot be adjudged a bankrupt. The idea of the act, then, seems to be, that if such number and value of creditors bring the debtor into court, in cases commenced after its passage, he shall not be required, in order to obtain a discharge, to obtain any further assent of any creditor to his discharge, or to pay any specified proportion of his debts, for it provides, in section nine, for dispensing, in such case, with the payment of any *per centum* of debts, and with the assent of any proportion of creditors. The bringing of the petition is regarded, in respect to cases commenced after the passage of the act of 1874, as the assent of the one fourth in number and the one third in value of the creditors to the discharge. But a voluntary petitioner comes into court of his own volition and without the previous agreement of any of his creditors. As to such a case, commenced after the passage of the act of 1874, the ninth section of that act declares that the debtor shall not have a discharge unless his assets be equal to thirty *per centum* of the claims proved against his estate, upon which he shall be liable as principal debtor, or unless one fourth of his creditors in number and one third in value assent to his discharge. In regard to voluntary cases, the assent of creditors seems to be required, with a view of placing the bankrupt on the same footing, as to the action of creditors, with the bankrupt in involuntary cases, the thirty *per centum* of assets being regarded as the equivalent of the assent. The ninth section of the act of 1874 does not contain language simply repealing, as a whole, the provision found in the act of 1868. It prescribes what *per centum* of assets there must be in cases of voluntary bankruptcy, namely, thirty *per centum*, and then repeals the provision "requiring fifty *per centum* of such assets." Provision being made by it for cases of compulsory or involuntary bankruptcy, and also for cases of voluntary bankruptcy, without any declaration that cases pending at the time of the passage of the act are referred to, the repeal of the fifty *per centum* provision may properly be regarded as a repeal of it only in *pari materia* with the scope of the rest of the section, with which it is joined by a copulative, and as repealing it only in reference to cases to be commenced after the passage of the act. In this view, there is nothing in the provision of the act of 1868, as applicable to cases pending at the time of the passage of the act of 1874, that is inconsistent with the provisions of the ninth section of the latter act, because such last named provisions have reference only to cases to be commenced after the passage of the act of 1874.

One consequence of holding that by virtue of the ninth section of the act of 1874, discharges can be granted in this case without a compliance with the provisions of the act of 1868, would be that, in some cases of involuntary bankruptcy commenced before the passage of the act of 1874, bankrupts would have obtained discharges only on a compliance with the act of 1868; in other such cases bankrupts would have endeavored to comply with the act of 1868, but failed to obtain the assent of their creditors; and in other such cases bankrupts would have made an effort to obtain discharges because satisfied they could not obtain such assent; and yet now all bankrupts put into involuntary bankruptcy in proceedings commenced before the passage of the act of 1874, would obtain discharges without procuring any assent of any creditor. This would work a practical discrimination among involuntary bankrupts in cases commenced before the passage of the act of 1874, resulting in injustice to some, or in injustice to the creditors of some; injustice to bankrupts who had complied with the act of 1868, or injustice to the creditors of those who had failed to obtain the assent required by the act of 1868. A construction which would so operate is not to be given, unless imperatively indicated.

In considering the question, the fact has not been overlooked that under the act of 1874 the requirement that one fourth in number and one third in value of the creditors shall join in order to put a debtor into compulsory bankruptcy, applies to all cases commenced after the 1st of December, 1873; but such fact is of no moment. The debtor so put into bankruptcy in a case commenced between the 1st of December, 1873, and the 22d of June, 1874, must, indeed, although put into bankruptcy by one fourth in number and one third in value of his creditors, still comply with the provisions of the act of 1868, before he can obtain a discharge. But this is only through a failure in the act of 1874 to relieve him from the operation of the act of 1868, and imposes upon him no burden to which he was not subject when the act of 1874 was passed.

Entertaining these views, I must withhold discharges in this case until the provisions of the act of 1868 are complied with.

he is to have the discharge without such payment or assent. And in cases of voluntary bankruptcy no discharge will be granted to a debtor whose assets shall not be equal to thirty *per centum* of the debts proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one fourth of his creditors in number and one third in value; and the provision in section 33 of the principal act requiring fifty *per centum* of such assets is hereby repealed.

It is plain, I think, that the section, on the face of it, applies to all cases in which a discharge is applied for after the passage of the act. It was so explained to the House of Representatives by Mr. Tremain, who had the bill in charge; Congressional Record, June 17, 1874, p. 60; and the words are almost precisely like those of the statute, which was so construed in *Ex parte Lane*, 3 Met. 213, in which Wilde, J., speaking for the court, said: "The court can have no authority to grant a discharge against a prohibition in the statute." And the other cases cited are similar. *In all*, the law was changed without any express application to future or past cases, and the court unhesitatingly applied it to both classes.

This construction is aided by the express words of the repeal which are found in sections 9 and 21. The repeal is unqualified and I know of no rule which will authorize me to limit the scope of the enactment of repeal, unless it were, indeed, to save rights or titles already vested. And this brings me to what I venture to call the fallacy that such a change in the bankrupt law is retroactive if it is made to affect pending cases. A law which discharges debts already contracted may well be called retroactive; and this law, if retroactive at all, would be so not merely as to cases begun, but as to contracts entered into before its passage. But it is well settled that a mere modification of the conditions upon which a discharge shall be granted to bankrupts is not retroactive. "It is clear," says the eminent jurist already quoted, "that the appellant had no vested right to a discharge at the time of filing his petition. Such a right could be acquired only by proving, at the time of applying for a certificate of discharge, that he had in all respects complied with the provisions of statutes 1838 and 1841 (the latter of which was passed after he had been adjudged an insolvent), by which only a right could be acquired. The latter statute, therefore, is not to be considered a retrospective act, disturbing vested rights, but as altogether prospective in its operation, although it (the discharge) might depend, in some cases, upon acts done before it took effect." 3 Met. 215.

The statute in *Ex parte Lane* was much more like a retrospective act than is that of 1874, because it actually deprived the insolvent of a discharge for a preference given before the act went into operation. This law neither creates new frauds nor relieves a bankrupt from the consequences of any which he has committed, but merely lightens somewhat the arbitrary conditions before imposed on honest bankrupts as a preliminary to obtaining a certificate. Such a law is always held to be remedial. *In re Billing*, 2 B. R. 161; *Revere* v. *Newell*, 4 Curt. 587.

It is said that one section of the amended act explicitly declares its applicability to pending cases, and another limits itself to cases begun after a certain day. This is true of those sections. But most of the sections leave the matter to interpretation, and must be judged by the subject

matter. Thus, section fourteen says that all proceedings may be discontinued upon the assent of a majority of the creditors. There can be no doubt that this covers all cases, whether begun before or after June 22. To settle a case in that way, may disappoint some hopes of creditors, but it is remedial, and disturbs no vested rights. So of the section now under consideration. The words seem plain to my apprehension; and the cases cited show how such laws have usually been understood.

I do not mean that there may not be many pending cases which have passed the stage at which the law would be applicable to them, in which, for instance, the debtor or the creditors may have been already entitled to a decree, which only remained to be formally pronounced when the new law went into operation. But, speaking generally, I say that the law was prospective, and applied to all cases in which the actual right had not been acquired, and that all inconsistent acts are unconditionally repealed.

A much more difficult question in my judgment may arise in respect to voluntary cases, namely, whether the assent referred to is that of the given number and value of all creditors who have proved their debts, or only of those to whom the bankrupt is liable as principal debtor; but as this is a compulsory case, that point need not be decided now.

Discharge granted.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

[TO APPEAR IN 110 MASS.]

RIPARIAN RIGHTS. — POLLUTION OF WATER BY SEWERS OF CITY. — NEGLIGENCE.

MERRIFIELD v. *CITY OF WORCESTER.*

If the water of a stream becomes polluted by the emptying into it of city sewers, so that a riparian proprietor cannot use it in his business as he has been before accustomed to do, he cannot recover against the city for the pollution, so far as it is attributable to the plan of sewerage adopted by the city; but he can recover for it so far as it is attributable to the improper construction or unreasonable use of the sewers, or to the negligence or other fault of the city in the care or management of them.

TORT. Writ dated April 5, 1871. The declaration alleged that the plaintiff was seised and possessed of a lot of land on both sides of Mill Brook, so called, in Worcester, with a machine shop thereon, fitted up with a large steam-engine and boilers for the purpose of furnishing steam-power to the tenants of his said machine shop; that he had a right to have the water of the brook flow pure and uncorrupted, such water in a pure condition being absolutely essential to the carrying on of his works; that the defendants, on April 5, 1861, and on divers days and times since, "wrongfully and unjustly cast, carried, and deposited, and caused to be

cast, carried, and deposited into said Mill Brook and the waters thereof, at points in the channel thereof above and higher than the works of the plaintiff, great quantities of filth, dirt, gravel, refuse material, matter discharged from sewers, privies, water-closets, stables, sinks, and streets, and divers other noxious materials and ingredients," by reason of which the water became greatly corrupted and unfit for use in the plaintiff's business, "said water so corrupted, among other things, corroding the plaintiff's boilers and engine and fixtures, causing an adhesion of sediment and other materials to said boilers, and greatly increasing the expense of making the necessary amount of steam for said works, and greatly increasing the danger of explosion in said boilers, and causing thereby frequent breakages in the engine, fixtures, and works, and deterioration thereof, and causing great expense in the repair thereof and in the interruption to the running of the works, thereby causing great injury to all of the plaintiff's establishment;" and that "the waters of the brook so corrupted are thereby rendered so offensive that it is difficult and expensive to procure competent engineers and workmen to operate said works."

At the trial in this court, the case, which is stated in the opinion, was reserved by Chapman, C. J., for the determination of the full court. If the court should be of opinion that the plaintiff was entitled to recover upon the case reserved, or any part thereof, the case to be sent to assessors to assess the damages sustained by the plaintiff, if any, upon such rules and instructions as the court should give; otherwise, judgment to be rendered for the defendants.

P. E. Aldrich, for the plaintiff, cited *Merrifield* v. *Lombard*, 13 Allen, 16; *Wesson* v. *Washburn Iron Co.* Ib. 95; *Wheeler* v. *Worcester*, 10 Allen, 591; *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, L. R. 1 Ch. 349; *Attorney General* v. *Metropolitan Board of Works*, 1 Hem. & Mil. 298; *Attorney General* v. *Council of Borough of Birmingham*, 4 K. & J. 528; *Oldaker* v. *Hunt*, 6 De G., M. & G. 376; *Attorney General* v. *Leeds Co.* L. R. 5 Ch. 583; *Spokes* v. *Banbury Board of Health*, L. R. 1 Eq. 42; *Lingwood* v. *Stowmarket Co.* Ib. 77; *Wood* v. *Sutcliffe*, 2 Sim. (N. S.) 163; Angell on Watercourses (6th ed.) § 136; Kerr on Injunctions, 382.

G. F. Hoar & T. L. Nelson, for the defendants, cited *Boston & Roxbury Mill Co.* v. *Newman*, 12 Pick. 467; *Hildreth* v. *Lowell*, 11 Gray, 345; *Wellington, petitioner*, 16 Pick. 89, 97; *Flagg* v. *Worcester*, 13 Gray, 601; Callis on Sewers, 80; Woolrych on Sewers, 1; Jacob, Law Dict. Tit. Sewer.

WELLS, J. The plaintiff sues for an alleged violation of his rights as a riparian proprietor upon a small natural stream running through the city of Worcester, near its centre. The injury complained of is that of polluting its water, so as to render it unfit for mechanical and other uses, to which he has been accustomed to apply it. He alleges generally that the defendant, in 1861, and on divers days and times since, has cast, and caused to be cast, carried and deposited into said brook, above the plaintiff's works, "great quantities of filth, dirt, gravel, refuse material, matters discharged from sewers, privies, water-closets, stables, sinks, and streets, and divers other noxious materials and ingredients." The declaration does not set out the particular grounds upon which it is proposed to

hold the municipal corporation responsible for these torts. The city would not be liable to an action for such direct acts of wrong, whether done by individual citizens or by its own officers, without proof of some special authority to do the acts, unless they resulted from or were connected with the exercise of some proprietary right by the city. *Oliver* v. *Worcester*, 102 Mass. 489, 497. From the report, we infer that the ground of liability is that the dirt, filth, and other materials were carried into the stream by means of certain drains or sewers constructed under authority therefor conferred upon the city council by the charter, Sts. 1848, *c.* 32, § 14; 1866, *c.* 199, § 30; and by the general laws. St. 1841, *c.* 115. Gen. Sts. *c.* 48, § 3.

The St. of 1867, c. 106, authorized the taking of Mill Brook and the entire diversion of its waters from the channel by which it passes the plaintiff's works. So far as he has suffered damage from any proper exercise of the power and rights conferred by that act, he must seek his remedy by a different proceeding from this, under the special provisions of the act itself. But the stream had not been so diverted at the time when this action was brought, and it does not appear that the injuries complained of were the result of any proceedings under that act. The allegations also cover a long period prior to its adoption.

It appears that in 1850, more than twenty years before the date of the writ in this case, a drain or sewer was constructed, by order of the city council, discharging from Thomas Street into Mill Brook, a short distance above the works of the plaintiff. This drain extended back to, and ran a short distance along Main Street. In 1857 and at various times subsequently this drain has been extended farther along Main Street; and drains running along several other streets have been connected with it. The plaintiff contends that the injurious effects of the drainage into the brook have thus been constantly increasing, down to the time of action brought. The question, so far as material, it is agreed shall be submitted to assessors, if in any aspect of the case the plaintiff is entitled to have his damages assessed. The case, then, presents the question, upon what grounds, and to what extent, a city is responsible in damages for such effects produced by its system of drainage, or by the manner in which its drains are used and managed.

The right, of which the plaintiff alleges a violation, is not that of acquired property in possession. It is not an absolute right, but a natural one, qualified and limited, like all natural rights, by the existence of like rights in others. It is incident merely to his ownership of land through which the stream has its course. As such owner he has the right to enjoy the continued flow of the stream, to use its force, and to make limited and temporary appropriation of its waters. These rights are held in common with all others having lands bordering upon the same stream; but his enjoyment must necessarily be according to his opportunity, prior to those below him, subsequent to those above. It follows that all such rights are liable to be modified and abridged, in the enjoyment, by the exercise by others of their own rights; and, so far as they are thus abridged, the loss is *damnum absque injuria*. The only limit that can be set to this abridgment through the exercise by others of their natural rights is in the standard or measure of reasonable use. *Gould* v. *Boston Duck Co.* 13

Gray, 442; *Haskins* v. *Haskins*, 9 Gray, 390; *Tourtellot* v. *Phelps*, 4 Gray, 370, 376; *Thurber* v. *Martin*, 2 Gray, 394; *Pitts* v. *Lancaster Mills*, 13 Met. 156; *Wadsworth* v. *Tillotson*, 15 Conn. 366; *Springfield* v. *Harris*, 4 Allen, 494.

So the natural right of the plaintiff to have the water descend to him in its pure state, fit to be used for the various purposes to which he may have occasion to apply it, must yield to the equal right in those who happen to be above him. Their use of the stream for mill purposes, for irrigation, watering cattle, and the manifold purposes for which they may lawfully use it, will tend to render the water more or less impure. Cultivating and fertilizing the lands bordering on the stream, and in which are its sources, their occupation by farm-houses and other erections, will unavoidably cause impurities to be carried into the stream. As the lands are subdivided and their occupation and use become multifarious, these causes will be rendered more operative, and their effects more perceptible. The water may thus be rendered unfit for many uses for which it had before been suitable; but so far as that condition results only from reasonable use of the stream in accordance with the common right, the lower riparian proprietor has no remedy.

When the population becomes dense, and towns or villages gather along its banks, the stream naturally and necessarily suffers still greater deterioration. Roads and streets crossing it, or running by its side, with their gutters and sluices discharging into it their surface water collected from over large spaces, and carrying with it in suspension the loose and light material that is thus swept off, are abundant sources of impurity, against which the law affords no redress by action. *Flagg* v. *Worcester*, 13 Gray, 601; *Barry* v. *Lowell*, 8 Allen, 127; *Turner* v. *Dartmouth*, 13 Allen, 291.

Upon the case stated in the pleadings and report, we must assume that the plaintiff is able to show an appreciable detriment to his rights in the stream. That detriment consists in its unfitness for certain uses in his works upon the stream; whereby he is deprived of a capacity, incident to the ownership of his land, to make such use of its waters as they pass; or his right so to use them is impaired in value. At most it is but the deprivation of that natural advantage, already impaired by other causes against which he has no redress. There is no allegation of damage to his property otherwise than by this deprivation; no allegation that a nuisance is created which injuriously affects his land or the occupation thereof.

It may readily be supposed that a small stream like Mill Brook, with a considerable city like Worcester upon either bank, and the adjacent lands descending rapidly towards its bed, would cease to preserve its waters from impurity, and become valueless for any purpose except that of drainage and the creation of power by its head and fall. All this may result even though no unjustifiable act be done to effect it. To enable a riparian owner to maintain an action for damages, he must show not only that the defendant has done some act which tends to injure the stream and which he has no legal right to do, or which is in excess of his legal right so as to be an unreasonable use thereof, but also that the detriment of which the plaintiff complains is the result of that cause. Where he can show an appreciable detriment to himself, and connect it with such

wrong by another, he may recover the damages shown to be due to that wrong. *Merrifield* v. *Lombard*, 13 Allen, 16.

It was decided in *Child* v. *Boston*, 4 Allen, 41, that in the laying out of common sewers, that is, "in determining what drains should be built and where they should discharge," the duties of the aldermen (or mayor and aldermen) were of a *quasi* judicial nature; that "they were required to act, not as agents of the city, or in any manner under the direction of the city, but as public officers."

For the incidental disadvantage, loss, or inconvenience necessarily resulting to individuals, in their rights of property, from such action; or from the execution of the work in a proper and skilful manner, as so laid out; or from the maintenance and use of the drains in a proper and reasonable manner, without negligence in their care and management, no action of tort can be maintained against the city. This exemption of municipal bodies and their officers from liability, and corresponding subordination of individual rights and interests to the safety, health, and welfare of the general public, is a principle of frequent application. *Baker* v. *Boston*, 12 Pick. 184; *Taylor* v. *Plymouth*, 8 Met. 462; *Commonwealth* v. *Tewksbury*, 11 Met. 55; *Commonwealth* v. *Alger*, 7 Cush. 53, 85; *Belcher* v. *Farrar*, 8 Allen, 325.

But in the construction of works so laid out, the town or city is responsible that it be done in a proper manner, and with a reasonable degree of skill and care; and if, for want thereof, any unnecessary injury is caused to the property or rights of individuals, the town or city may be charged therewith in an action of tort. *Perry* v. *Worcester*, 6 Gray, 544; *Sprague* v. *Worcester*, 13 Gray, 193; *Emery* v. *Lowell*, 104 Mass. 13.

According to the rule laid down in *Child* v. *Boston*, the city is also responsible for the proper care and management and reasonable use of drains established in accordance with the general provisions of the statutes, and liable in damages for injuries suffered by reason of negligence or other fault of the city, or its officers and agents having the charge thereof.

Whether the damage which the plaintiff has suffered is attributable in any degree to the improper construction or unreasonable use of the sewers, or to the negligence or other fault of the defendant in the care and management of them, is a question which does not appear by the report to have been tried. If it should be found to be so attributable, the action may be maintained; and this question must be first determined by the assessors provided for by the report, who are "to assess the damages sustained by the plaintiff, if any," upon the rules and principles herein set forth.

Assessors to be appointed.

SUPREME COURT OF PENNSYLVANIA.

[MAY, 1874.]

JUDGMENT NOTE. — BANKRUPTCY.

SLEEK v. *TURNER'S ASSIGNEE.*

A judgment note made more than four months prior to an adjudication of bankruptcy upon which an execution is issued within four months, is not necessarily fraudulent.

Mr. *A. H. Coffroth*, for plaintiffs in error.

Mr. *A. J. Colborn, contra.*

SHARSWOOD, J. This was a feigned issue in the court below to determine the validity of a judgment entered upon the 26th day of February, 1872, upon a judgment note executed by Lewis A. Turner, for the sum of $204, on the 21st October, 1871, for a just debt owing by him to Sleek & Blackburn. It was payable in sixty days. On the 10th of April, 1872, certain creditors of Turner presented a petition to the district court of the United States for the Western District of Pennsylvania to have Turner adjudicated a bankrupt. Under these proceedings, an assignment was made to the plaintiff below on July 5th, 1871, and the fund in court having been raised under an execution upon the judgment, the assignee came in and claimed the money on the ground that the judgment was a fraudulent preference, and void under the thirty-sixth section of the Bankrupt Law, the act of Congress of March 2, 1867. This section provides that "if any person, being insolvent or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached or seized in execution, or makes any pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited."

On the trial of the feigned issue, the learned judge was requested to charge the jury "that if the note on which the defendant's judgment was entered was given for a valuable consideration more than four months before the commencement of the proceedings in bankruptcy against L. A. Turner, then the judgment and *fi. fa.* issued thereon are valid, although the judgment was entered and *fi. fa.* was issued within four months of the commencement of said proceedings in bankruptcy, and the verdict must be for the defendants." This point the learned judge refused to affirm, but on the contrary, instructed the jury that when the entry of judgment and execution and levy are made within the four months before

the petition of bankruptcy, the preference thus given is invalid, although the judgment note was given more than four months before. In this we think there was error, and as it was an error which ran through and infected the whole charge, it will be unnecessary to consider the other assignments.

It is clear that Turner did not procure the judgment to be entered on the 26th of February, 1872, within four months of the filing of the petition. As to that entry he was entirely passive. He had made and delivered the judgment note on October 4, 1871, more than four months before the petition, for an honest debt, to which he could interpose no defence. He was entirely passive so far as the entry of the judgment and the issuing of the execution was concerned. How then could he be said, in any sense, to have procured the judgment and execution, and thereby given the defendants a preference? Had the note been a simple note, and the defendants had commenced suit upon it, and in due course obtained judgment for want of a plea or affidavit of defence, the case would have been no stronger. The supreme court of the United States have decided that something more than passive non-resistance in an insolvent debtor is necessary to invalidate a judgment and levy on his property when the debt is due and he has no defence. *Wilson* v. *Bank of St. Paul*, 31 Leg. Int. 29; 1 Am. L. T. R. (N. S.) 1. It was held also in that case, that though the judgment creditor may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the bankrupt law. We regard this decision as directly in point, and are bound to receive it as an authoritative exposition of the act of Congress by the highest tribunal in the land, invested by the Constitution with the power of deciding such questions in the last resort.

Judgment reversed, and venire facias de novo awarded.

COURT OF APPEALS OF VIRGINIA.

[TO APPEAR IN 24 GRATTAN.]

CRIMINAL LAW. — CONVICTION OF ASSAULT WILL NOT BAR INDICTMENT FOR FELONY. — EVIDENCE OF WIFE OF CONFESSION OF HUSBAND. — MALICE. — PRACTICE.

MURPHY v. *THE COMMONWEALTH.*

1. *The act of March 30th*, 1871, *Sess. Acts* 1870–71, *p.* 332, *does not give justices of the peace jurisdiction to try a case of felony; and the conviction and punishment of a party by a justice for an assault and battery will not bar a prosecution for wounding with intent to kill, by the same act for which he was punished by the justice.*
2. *If the accused has been indicted and convicted for a mere assault and battery in the county court having jurisdiction of such offence generally, the conviction will not be a bar to an indictment for a felony, in the perpetration of which the assault and battery was committed.*
3. *On a trial for an assault with intent to kill, the witness upon whom the assault*

was alleged to have been made was asked if he did not tell his wife that the prisoner acted only in his own defence. 1. The answer to the question may tend to criminate himself, and the testimony is inadmissible. 2. It required him to state a communication supposed to have been made by him to his wife, which, if made, was a confidential communication, and which he was not bound to disclose.

4. *Where a question is put to a witness which he answers, and which relates to a collateral matter not connected with the subject of the prosecution, his answer to that question is conclusive, and cannot be contradicted.*
5. *In this case, after the witness was asked the question whether he did not state to his wife that the defendant had acted only in his own defence, and he had answered the question denying that he had done so, the wife of the witness was introduced to prove the statement was made to her. She is not a competent witness to prove it, though at the time it was alleged to have been made they were living apart from each other, but not divorced.*
6. *A man is taken to intend that which he does, or which is the natural and necessary consequence of his own act. Therefore, if the prisoner wounded the prosecutor, by the deliberate use of an instrument likely to produce death under the circumstances, the presumption of the law is that he intended the consequences that resulted from said use of said deadly instrument.*
7. *Malice may be inferred from the deliberate use of a deadly weapon, in the absence of proof to the contrary.*
8. *Where there are two counts in an indictment for a felony, and there is a general finding by the jury of "guilty," if either count is good, it is sufficient.*

AT the October term for 1872 of the county court of Scott County, Alexander Murphy was indicted for making an assault on John Murphy, with intent to maim, disable, disfigure, and kill him. The indictment contains two counts. The first charged the assault with the felonious and malicious intent, in the usual form; and there was no doubt that it was a good count. The second charged that "Alexander Murphy, on the —— day of ——, in the year 1872, in the county of Scott, did make an assault in and upon the body of one John Murphy, and him the said John Murphy feloniously did strike on the head with a hoe, and by so striking the said John Murphy on the head as aforesaid, with the hoe as aforesaid, he, the said Alexander Murphy, then and there feloniously and maliciously did cause the said John Murphy great bodily injury, with intent, him the said John Murphy, to maim, disfigure, disable, and kill; against the peace and dignity of the commonwealth."

The proceedings in the case are fully stated in the opinion of Judge Moncure.

J. A. Campbell & Lane, for the prisoner.

The Attorney General, for the commonwealth.

MONCURE, P., delivered the opinion of the court.

This is a supersedeas to a judgment of the circuit court of Scott County, affirming a judgment of the county court of said county, convicting the plaintiff in error, Alexander Murphy, of felony, in feloniously and maliciously striking and wounding his father, John Murphy, with intent to maim, disfigure, disable, and kill the said John Murphy. The errors complained of appear in the several bills of exception, which were taken to opinions of the county court given during the progress of the trial. We will notice them in the order in which the said bills of exception were taken and are numbered in the record. And, —

First. We are of opinion that the county court did not err in overruling the motion of the plaintiff in error to withdraw his plea of not guilty, and file the special plea set out in the first bill of exceptions. Even if the special plea had been offered in time it presented no bar to the prosecution, and was properly rejected on that ground. It avers that the plaintiff in error had been charged before a justice of the peace of said county with having committed an assault upon the said John Murphy; that the said justice had jurisdiction of the case, and after hearing all the evidence, found the accused guilty of the assault charged, and adjudged him to pay the sum of ten dollars as a penalty therefor and costs; that the said judgment was final, unrevoked, and in full force; that the assault and battery so charged, and of which he was so convicted before said justice, is the same identical offence set forth in said indictment; and that the record of said proceeding had been lost, so that the same could not be produced; but that he was ready to make proof of the same by said justice and others.

This proceeding before a justice of the peace must have been under the act approved March 30, 1871, entitled "An act to extend the jurisdiction of police justices and justices of the peace in certain cases;" Acts of Assembly, 1870–71, p. 362. But that act, while it gives to justices of the peace "concurrent jurisdiction with the county and corporation courts of the state, of all cases of assault and battery, *not felonious*, occurring within their jurisdiction," gives them no jurisdiction whatever of such cases of assault and battery as *are* felonious. And as the assault and battery charged in the indictment in this case, and of which the accused was convicted by the verdict and judgment, was felonious, therefore a justice of the peace had no jurisdiction of the case; and any judgment which may have been rendered by a justice as alleged in said plea is null and void, and was no bar to the prosecution for the felony.

But even if the accused had been indicted and convicted of a mere assault and battery, in the county court having jurisdiction of such an offence generally, the conviction would not have been a bar to an indictment for a felony in the perpetration of which the assault and battery was committed. The misdemeanor in such case is considered as merged in the felony. "Where the prisoner has been convicted of a misdemeanor, and is afterwards indicted for a felony, the two offences have been considered so essentially distinct, that a conviction of one was deemed no legal bar to the indictment of the other. In the *Commonwealth* v. *Roby*, 12 Pick. R. 496, the misdemeanor was an assault charged to have been committed with intent to murder. After conviction of this offence, the party assaulted died, and then the prisoner was indicted of murder. He pleaded *autrefois convict*, to which there was a demurrer; and after full argument and great consideration, the judges came unanimously to the conclusion, that the facts constituting the murder would not have been competent evidence to warrant a conviction of the assault, and judgment was entered that the plea was not good, and that the prisoner should answer over to the indictment." 3 Rob. Pr. (old ed.) 131.

Secondly. We are of opinion that the county court did not err in excluding certain evidence from the jury, as mentioned in the second bill of exception. It is stated in that bill, "that upon the trial of this case, the

commonwealth introduced John Murphy as a witness; and upon his examination, he was asked by the defendant if he did not state to his wife, Nancy Murphy, at his own house, a short time after he was struck by the defendant, that the defendant acted only in his own defence; to which he replied, that he did not make any such statement. The defendant further asked the said witness, Murphy, if he was not living at the time in a state of adultery, and that the difficulty arose by his espousing the cause of the said Mary Elliott; to which he replied that he never had any sexual intercourse with the said Elliott. The said Nancy Murphy was then called by the defendant, and stated that at the time of the said difficulty, said John Murphy and Mary Elliott were living together as man and wife; that he had driven the witness, his wife, off, some six or seven years since, and also his children, and they still live apart; and further, that he stated to her at his own house, a short time after the difficulty, that he would rather be killed than that Mary Elliott should be hurt; and that at the time Alexander Murphy, the defendant, struck him, he was acting only in his own defence; all of which, upon the motion of the commonwealth, was excluded from the jury;" to which the defendant excepted.

The evidence thus excluded consisted of answers of the witness, John Murphy, to two questions put to him by the defendant on cross-examination; and a statement made by the witness, Nancy Murphy, on her examination in chief by the defendant. The court did not err in excluding the first question propounded to the witness, John Murphy, and his answer thereto: 1st, because the question tended to criminate the witness; and 2d, because it required him to state a communication supposed to have been made by him to his wife, which, if made, was what the law considers a confidential communication, and which he was not bound to disclose. Nor did the court err in excluding the second question propounded to the said John Murphy, and his answer thereto: 1st, because the question tended to criminate the witness; 2d, because the fact sought to be proved by the answer to this question was wholly irrelevant and inadmissible evidence in the case; and 3d, because the answer of the witness to the question, "that he never had any sexual intercourse with the said Elliott, denied the guilt imputed to him by the question; which being a collateral matter not connected with the subject of the prosecution, his answer to the question was conclusive, and could not be contradicted by any testimony on behalf of the defendant. In regard to the statement made by the witness, Nancy Murphy, wife of the said John Murphy, the court did not err in excluding it, if not because the whole of it tended to criminate her husband, at least, because that part of it which related to John Murphy and Mary Elliott's living together as man and wife, and to his having driven off his wife and children, and living apart from them, was irrelevant and inadmissible evidence in the case, and because the residue of it disclosed communications supposed to have been made by the husband to the wife, is what the law considers confidential; and which, therefore, she had not a right to disclose.

To show that the evidence of the wife was admissible in this case, 1 Phil. on Ev. top page 68, marg. 84, was referred to, and relied on by the counsel for the plaintiff in error. It is there said, that "although the husband

and wife are not allowed to be witnesses against each other, where either is directly or immediately interested in the event of a proceeding, whether civil or criminal, yet in collateral proceedings, not immediately affecting their mutual interest, their evidence is receivable, notwithstanding that the evidence of the one tends to contradict the other, or may subject the other to a legal demand, or even to a criminal charge." "The rule laid down in the case of the *King* v. *The Inhabitants of Cliviger*," 2 T. R. 263, it is further said by that writer (namely, that a husband or wife ought not to be permitted to give any evidence that may even tend to criminate each other), "is now considered as having been laid down in terms much too general and undefined." He then refers to the cases of the *King* v. *The Inhabitants of All Saints*, 6 Maul. & Sel. 194; and *The King* v. *The Inhabitants of Bathwick*, 6 Barn. & Ad. R. 639, in which he says the rule was much discussed, and the court of king's bench was of opinion, after much argument, that the rule laid down in *The King* v. *Cliviger* was too large and general. In a subsequent case, however, *The King* v. *Gleed*, 2 Russ. Cr. & M. 983, ed. by Greaves, also mentioned by Phillips, "Upon an indictment for larceny, where a woman was called on the part of the crown to prove that her husband, who had absconded, had been present when the article was stolen, and that she saw him deliver it to the prisoner, — Taunton, J., after consulting with Littledale, J., rejected the witness. His lordship says: 'The evidence of the wife here would directly charge the husband with being a principal; and although there is no prosecution pending, her evidence cannot but facilitate an accusation against her husband. Now the law does not allow the wife to give evidence against her husband, and it is quite consistent with that principle, that this evidence should not be received.'" "It may be doubted, however," says Phillips, "whether this ruling was correct. It would certainly appear not to be so upon the principles laid down in *Rex* v. *Bathwick* (which was cited in the case), for if the husband were indicted for the theft, the wife could not be a witness on that trial, nor could anything she had said on the former trial be in any way adduced in evidence against him."

Thus the law seems to stand in England, where the weight of authority now is, that in such a case as this the testimony of the wife would not be inadmissible on the ground of interest, and that it tended to criminate her husband; and the weight of authority in this country, that is, in the states of this Union, may be the same way. See 1 Greenl. on Ev. § 342 and notes. But in *Stein* v. *Bowman*, 13 Peters R. 209, the case of *The King* v. *Cliviger*, 2 T. R. 263, is mentioned without disapprobation by McLean, J., in delivering the opinion of the court, though he refers also to the subsequent case reported in 6 Maul. & Sel. 194, and concludes that the law does not seem to be entirely settled how far in a collateral case a wife may be examined on matters in which her husband may be eventually interested. The most that can be said on the subject seems to be, that the law upon the question is unsettled.

But we do not deem it necessary to decide the question in this case, as there is another ground upon which we think that so much of the evidence rejected as is relevant to the case is clearly inadmissible — we mean that portion of the evidence of Nancy Murphy, which says that her husband

"stated to her at his own house, a short time after the difficulty, that he would rather be killed than that Mary Elliott should be hurt; and that at the time Alexander Murphy, the defendant, struck him, he was acting only in his own defence." The ground on which this evidence is inadmissible is thus stated in Greenleaf on Evidence, § 254: "Communications between husband and wife belong also to the class of privileged communications, and are therefore protected, independently of the ground of interest and identity, which precludes the parties from testifying for or against each other. The happiness of the married state requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures, by providing that it shall be kept forever inviolable; that nothing should be extracted from the bosom of the wife which was confided there by the husband. Therefore, after the parties are separated, whether it be by divorce or by the death of the husband, the wife is still precluded from disclosing any conversation with him; though she may be admitted to testify to facts which came to her knowledge by means equally accessible to any person not standing in that relation." Several authorities are cited in the note to this section, but only two of them will be noticed here. In *Stein* v. *Bowman*, 13 Peters R. 209, it was held that a wife, after the death of her husband, cannot be allowed to prove that her husband had confessed to her that he had committed perjury in a deposition read in the cause. McLean, J., in delivering the opinion of the court, said: "In the present case the witness was called to discredit her husband; to prove, in fact, that he had committed perjury, and the establishment of the fact depended on his own confession — confessions which, if ever made, were made under all the confidence that subsists between husband and wife. It is true the husband was dead, but this does not weaken the principle. Indeed, it would seem rather to increase, than lessen, the force of the rule. Can the wife, under such circumstances, either voluntarily be permitted, or by force of authority be compelled, to state facts in evidence which render infamous the character of her husband? We think, most clearly, that she cannot be. Public policy and established principles forbid it." In *Robin, &c.* v. *King*, 2 Leigh, 140: In a suit by persons held in slavery against their master, to recover their freedom, defendant claimed plaintiffs as slaves by purchase of them as slaves from W. K., deceased; and plaintiffs offered K. K., widow of W. K., to prove that W. K., in his lifetime, before sale to defendant, repeatedly declared, in presence of his family, and without injunction of secrecy, that the mother of plaintiffs then held by him in slavery was an *Indian* woman. *Held:* Widow not competent witness to prove such declarations of her deceased husband. This is the reporter's abstract of the decision. Judge Carr, in his opinion, in which the other judges concurred, fully recognizes the principle of evidence which forbids the disclosure by a husband or wife of confidential communications received from the other. After citing and commenting upon several cases of the kind, he says: "These are cases in which the husband was a party; but the principle applies also where he is no party; for in the one case or the other, it is equally a violation of the confidence reposed, to divulge, in a court of justice, what was imparted in the sacred privacy of domestic intercourse; and of this opinion, Starkie seems to be." After quoting a

passage from that author's work on evidence (part IV. p. 709), he further says: "Now the case from Strange did not violate this rule; the wife disclosed no communication; but being present when the goods were bought, she was called to prove on whose credit the sale was made. But is not our case very different? I think so. The husband was at the time holding in slavery the mother and her children; if she was an Indian woman they were all entitled to their freedom. Can we possibly suppose that he meant to make such a declaration public? It is stated that the party offered to prove that these declarations were made repeatedly in the presence of the family, and they were not requested to keep them secret. This could only, I presume, be proved by the wife; and I question the propriety of permitting her thus to qualify herself to disclose such communications. But suppose it proved that the declarations were so made, and no secrecy enjoined; would it follow that the husband wished or expected they should be divulged? Are we to say that every word spoken in the thoughtless, careless confidence of the domestic circle is free for public disclosure, unless secrecy be expressly enjoined? Is not the converse of the proposition true? And would it not have a most mischievous effect, would it not seriously break in upon that confidence which is the charm of domestic life, if men should, from our decisions, have cause to fear that after they were in their graves, their reputation might be injured and their children ruined, by the declarations they had made in the bosoms of their families? This freedom from restraint or apprehension, in the intercourse of one's own fireside, seems to me so necessary to the quiet and repose of society, that I am fearful of trenching upon it in the slightest degree."

According to the authorities referred to, we think there can be no doubt of the inadmissibility, as evidence in this case, of the statement said by the witness, Nancy Murphy, to have been made to her by her husband, at his own house. That the husband and wife lived apart when the statement was made does not take the case out of the operation of the principle. The parties were not legally separated. They still were man and wife, entitled to all their legal rights as such, however unworthily the husband may have acted. The rest of the evidence set out in the second bill of exceptions is inadmissible, as we have clearly seen, upon other grounds.

Thirdly. We are of opinion that the said county court did not err in overruling the motion of the prisoner to set aside the verdict and grant him a new trial, as mentioned in his third and last bill of exceptions; and that all the reasons assigned in said bill for granting such new trial are insufficient for that purpose. They are five in number. The 1st, "Because he was arraigned and plead without the aid of counsel, having none present when he plead not guilty to the indictment," is not well founded. A man may plead for himself. The prisoner said he had counsel, though they happened to be absent. He plead voluntarily, and had the cause continued; and his counsel were present and defended him at his trial. The 2d and 3d have already been disposed of, being the subjects of the first and second bills of exception. The 4th is, "Because the court erred in giving to the jury the instructions asked for by the commonwealth. These instructions were not excepted to when they were given, nor until after the verdict; and it is at least doubtful, whether they can be regarded

as a part of the record. They are not copied in the third bill of exceptions, nor are they therein referred to, except by being mentioned as aforesaid, in the third of the reasons assigned for a new trial. They are copied by the clerk at the end of the record. Without deciding whether they can properly be considered as a part of the record, but assuming them to be so, for the purposes of this case, we are of opinion that the court did not err in giving them. After giving two instructions on the motion of the prisoner, the court gave the following on the motion of the commonwealth: —

"The court also instructs the jury, that the law is, that a man is taken to intend that which he does, or which is the natural and necessary consequence of his own act: and therefore, that if they believe from the evidence that Alexander Murphy wounded his father, John Murphy, by the deliberate use of an instrument likely to produce death, under the circumstances, then the presumption of the law, arising in the absence of proof to the contrary, is, that he intended the consequences that resulted from said use of said deadly instrument.

"The court further instructs the jury, that the law is, that malice may be implied from the deliberate use of a deadly weapon in the absence of proof to the contrary." These two instructions correctly expound the law, and were appropriate, and not mere abstractions. The 5th and last of the reasons assigned are, that "the judgment should be arrested, because there is no felony charged in the second count of the indictment, which may be the one under which the jury found him guilty." They found him guilty under both; and if either be sufficient, it is enough. Whether a felony be charged in the second count or not, is a question which we need not decide, as the first is certainly a good count, and is conceded to be so by the plaintiff in error. No motion was made to set aside the verdict upon the ground that it was contrary to law and evidence; and certainly it was contrary to neither.

We are of opinion that there is no error in the judgment, and that it ought to be affirmed. *Judgment affirmed.*

DISTRICT COURT OF THE UNITED STATES. — EASTERN DISTRICT OF MICHIGAN.

[AUGUST, 1874.]

ADMIRALTY. — MARITIME LIEN FOR NECESSARIES SUPPLIED TO FOREIGN SHIP. — ASSIGNMENT OF SUCH LIEN.

THE CHAMPION.

Maritime liens for necessaries supplied in England to a foreign ship have always existed there.

The assignment of a claim under a maritime lien divests the lien.

THIS is a libel *in rem* by James O'Leary, for wood supplied to the tug by the libellant at Lampton, on Saint Clair River, in the Province of

Ontario, in October and November, 1871. The tug was a vessel of the United States, and owned and registered at Detroit, in this district.

The libellant was a citizen of Ontario, and a subject of Great Britain.

Before the suit was brought, O'Leary had assigned his claim to Johnson & Co., brokers and bankers, of Port Huron, in this district, and the suit was brought at their instance and for their benefit.

The claim was evidenced by drafts drawn by the master of the tug upon the owner. After the suit had been commenced, and before the hearing, Johnson & Co. withdrew the drafts from the hands of their proctors, and without further consultation or coöperation with them, made a settlement with and received payment from the owner of the tug, but not including costs, and without any reservation as to costs, and delivered up the drafts; and the proctors' costs have not been paid. Libellants' proctors now ask for a decree for their costs.

This is opposed on behalf of the owner of the tug, on three grounds:

First. That by the laws of the Province of Ontario, where the supplies were furnished, there was no maritime lien for the same; and that therefore libellant had no right of action *in rem*, and the court was without jurisdiction in the premises.

Second. That any lien which may have existed in favor of libellant ceased on the assignment of his claim to Johnson & Co.

Third. That in any event, the proctors having voluntarily delivered up to Johnson & Co. the evidences of claim, and thus enabled them to make a full and complete settlement with the owner, the proctors cannot now, without proof of collusion, look to the tug or her owner for their costs, but must look to Johnson & Co. alone.

Upon the question of lien, it is conceded that if a maritime lien for supplies had an existence in Ontario in any case, it had in this.

There are several other suits against the tug in behalf of Canadian parties, for supplies, and depending substantially upon the same questions as the present case, and the decision in this case is to determine the others.

Mr. *L. S. Trowbridge*, for libellant.

Mr. *F. H. Canfield*, *contra*.

LONGYEAR, J. The argument of respondent's advocate in support of the first ground of defence — that there was no lien by the *lex loci contractus*, and therefore no right of action *in rem* in this court — is based upon the following propositions: —

First. That the laws of France, which prevailed in Canada at the time of its conquest by England, and by which there was a lien for necessaries supplied to a ship, had been superseded by the laws of England.

Second. That a lien for necessaries supplied to a ship, whether domestic or foreign, never had an existence in England until it was created by act of parliament.

Third. That the act of 3 & 4 Victoria, chap. 65, sec. 6 (in 1840), creating a lien in such cases, had no operation in Upper Canada, now the Province of Ontario, because not so expressly named and provided.

Fourth. That such was the state of the law in the Province of Ontario in October and November, 1871, when the cause of action in this case arose.

The arguments were confined to these propositions, and were con-

ducted on both sides with commendable zeal and ability, and elaborate research. I have also received much aid from an instructive brief of Messrs. H. H. Swan and J. W. Finney, proctors and advocates for libellants in another suit now under advisement and in which this same question is involved.

It will be seen that the second proposition lies at the foundation of the entire argument; because it is only by maintaining it, that the others are of any consequence. The second proposition will therefore be first considered. In considering this proposition, it must be borne in mind that the Champion was a vessel of the United States and therefore foreign to the place where the necessaries were supplied.

It is too well settled and understood to need citation of authorities, or admit of discussion, that, as to domestic vessels, jurisdiction to enforce the lien accorded by the maritime law to material-men, by action *in rem* in the admiralty or elsewhere, was long since overthrown and denied in England, and the lien itself held never to have had any existence there. Such has hitherto always been the rule in the United States also, where the maritime law was at first adopted as it was administered in England, together with all its inconsistencies and incongruities as applied to the condition of things here. The incongruity of limiting the jurisdiction to tide water has already been abandoned, and has ceased to mar the harmony of the system; and judging from the recent amendment of Admiralty Rule 12 by the supreme court, and certain foreshadowings by recent enunciations from the bench of that court, and to which may be added a recent decision by the district court for the Eastern District of Missouri, it is evident that *this other* is about to meet the same fate. *Wilson* v. *Bell*, 6 Chicago Leg. News, 261; *The Commonwealth*, 20 Internal Revenue Record, 64; *S. C.* 6 Chicago Leg. News, 234.

But it is by no means so well settled, although seemingly so understood, that the denial of jurisdiction in the admiralty to enforce liens of material-men, extended to necessaries supplied in England to *foreign vessels*, and much less so in regard to the *existence* of the lien in such cases. It is true, it seems to be assumed by Mr. Abbott in his excellent work on shipping (pages 142 to 150), and it was no doubt held by the court of king's bench, that the denial went to that extent, both as to the jurisdiction and the existence of the lien. To my mind, however, it is apparent from the notes to those pages of Abbott, and the cases there cited and commented on in both text and notes, that the controversy in this respect between the admiralty and common law courts of England never was entirely settled and determined, the one way or the other: that, in fact, that controversy continued as to foreign vessels until it was finally disposed of and determined in favor of the admiralty, by the statute of 3 & 4 Vict. *supra*. The high court of admiralty did not understand the denial to have gone to the extent claimed, certainly as late as 1834. In that year, in the case of *The Neptune*, 3 Hagg. 129, 140; 8 Eng. Adm., Sir John Nicholl, delivering the opinion of the court, says: "In England, then, the law of nations, of which the *lex mercatoria* is a branch, forms part of the common law, unless it be altered or controlled by parliament or the municipal courts. It is clear that by the civil law, and by the general law of other nations, when uncontrolled, persons who

have furnished materials for the fitting out of a ship have a lien upon the ship itself, and if so, upon the proceeds of the ship. If an English ship were repaired in France or in Holland, material-men might there arrest and enforce payment against the ship itself. How far a foreign ship repaired here might not be subject to the same right is a question into which it is not necessary now to inquire, for the Neptune is a British ship, and in such case the municipal courts of this country have so far departed from the rule of the civil law that they have held that the lien does not extend to the ship itself; and so far, therefore, this court is restrained; but they have not gone further." It is true, the Neptune, being a domestic ship, and the repairs having been done in England, and the application in that case being to participate in surplus proceeds, and not a proceeding against the ship itself, the point thus discussed was not directly involved; but what was said none the less shows that, in the opinion of Sir John Nicholl at least, the question of lien for necessaries supplied to a foreign vessel in England had not then passed beyond controversy in her courts.

The judgment in that case was afterwards reversed by the privy council, 2 Knapp's Cases, 94, on the ground that it allowed a party to participate in proceeds who had no lien upon the vessel itself; and it became a leading case and was deemed a final determination of the question of lien for necessaries supplied in England, so far as it related to domestic ships.

The statute of 3 & 4 Vict., *supra*, must be regarded, I think, as declaratory, or at least as a recognition, merely, of what the maritime law then was, so far as concerned the question of lien for necessaries supplied to a foreign ship, whether within the body of a country or upon the high seas, and not as introducing a new principle into English jurisprudence. This, I think, is abundantly evident from the language of the enactment itself, which is as follows: "The high court of admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce payment thereof, whether such ship or vessel may have been within the body of the country or upon the high seas, at the time when the services were rendered, or damage received, or necessaries furnished, in respect of which such claim is made." Abb. on Ship. 150. It will be noticed that the act does not purport to *create* a lien. It leaves that question just where it stood before, and, of course, to be determined by the maritime law. It seems to assume the existence of the lien, and then simply restores to the admiralty a jurisdiction in relation to it, of which it had been deprived by the municipal courts. That this is the light in which that act was regarded by the high court of admiralty, is evident by the subsequent decision of that court in at least two cases. One, *The Alexander*, 1 W. Rob. 288, soon after the act went into operation, holding that the jurisdiction conferred by the act was not confined to cases of necessaries supplied after it went into operation; and the other, *The Wataga*, Swab. 165, at a later period (1856), holding that the jurisdiction conferred by the act extended to claims for necessaries supplied to a foreign vessel in colonial as well as in British ports.

In the case of *The Alexander* the libel was *in rem* against a Norwegian ship for necessaries supplied to her in England in 1835, five years before the act went into operation. The jurisdiction of the court was contested on the ground that the act did not affect past claims. But the court held the contrary, and maintained the jurisdiction. In the course of the opinion (p. 294), Dr. Lushington said: "Now the action in the case is brought in virtue of the particular statute recently enacted, and without that statute the court would not have been justified in entertaining the suit at all; for although the subject matter of the case clearly falls within the original scope of the maritime law, before the passing of the statute the court might have been prohibited from proceeding in the cause, on the ground that the common law had narrowed the general jurisdiction originally belonging to this court; such prohibition is now taken off by the statute, but looking to the words of the act I do not find any expressions limiting the jurisdiction of the court to cases accruing subsequent to the period when the act came into operation." The learned doctor treated the statute simply as an act of delivery of the admiralty from the thraldom in which it had been held by the common law courts; and he maintained the jurisdiction, not because the statute created a lien, or that the claim or cause of action had any foundation in it, but because the lien, claim, and cause of action clearly fell "within the original scope of the maritime law," and had their foundation in *it*. I consider the learned doctor's position entirely sound, and am not aware that its soundness has ever been questioned.

In the case of *The Wataga* the application was for payment out of the proceeds of an American ship for necessaries supplied to her in 1856, at the Cape of Good Hope, a British possession — the case being, in its incidents, almost identical with the one now under consideration. The application was opposed on the ground that the statute of 3 & 4 Vict. ch. 65, sec. 6, was not intended to apply to the case of necessaries supplied to a foreign ship in a port at a distance from England, though a British possession. But Dr. Lushington, by whom this case was also decided, held otherwise, and maintained the jurisdiction. The decision in that case would maintain the jurisdiction in this in that same court. At the close of the opinion (p. 167), and after fully discussing the object and purposes of this act, he throws out the following significant intimation: "This claim must be maintained; but I am by no means clear, even if I am mistaken on the point of colonial ports, that it could not be supported under the narrower interpretation."

The high court of admiralty seems, in fact, never to have relinquished its claim that under the general maritime law there was a lien for supplies, whether to domestic or foreign vessels, or whether within the body of a country or upon the high seas, only so that they were necessary and were furnished upon the credit of the ship. It simply surrendered to the superior jurisdiction and powers of the common law courts, and ceased to exercise the jurisdiction to enforce the lien. When parliament in part took off the prohibition imposed by the common law courts, by the statute of 3 & 4 Vict., the high court of admiralty to that extent simply resumed that which it had all along claimed as its right, and proceeded at once to enforce a lien which it assumed, and no doubt rightfully, had simply been in abeyance.

That the lien for necessaries supplied to a ship, recognized by the general maritime law, always existed in England as to foreign ships, before as well as after the act of 3 & 4 Vict., was assumed by our courts from the earliest period of the exercise of admiralty jurisdiction here; for while adopting, in the main, the admiralty jurisprudence of England as there exercised, the supreme court of the United States from the beginning assumed and fully recognized the existence of the maritime lien for necessaries supplied to a foreign ship in all cases, and the jurisdiction of the federal admiralty courts to enforce it. See General Admiralty Rule 12. This rule, from the beginning, and all through its various modifications by amendments or otherwise, has always assumed the existence of the lien, and provided for its enforcement. This has always been true of it as to foreign ships, and recently it has been so amended as to drop all distinction in that regard.

Maritime liens for necessaries supplied in England to a foreign ship, I am satisfied have always had an existence there. Jurisdiction to enforce them was alone prohibited. It is well settled, however, that want of jurisdiction to enforce a maritime lien in any particular locality is not fatal to the existence of the lien itself. The lien exists by virtue of the maritime law, and it follows the ship wherever she goes, and may be enforced wherever there is a jurisdiction to enforce it. *The Maggie Hammond*, 9 Wall. 435, 451; *The Avon*, 6 Chicago Leg. News, 41. And this applies as well to the objection that there is no jurisdiction to enforce a maritime lien in the Province of Ontario, where the cause of action in this case arose.

The question of lien in this case, therefore, in the absence of any positive enactment to the contrary, must be determined by the general maritime law, and by that law there was a lien, and also jurisdiction in this court to enforce it.

No objection was made that the necessaries in question were not supplied upon the *high seas*, or upon *tide water*, as those terms are understood in English admiralty jurisprudence, and that therefore there could be no lien, and it is therefore unnecessary to consider it.

The omission of learned counsel to make that objection was undoubtedly for the very good reason that since the decision of the United States supreme court in the case of *The Eagle*, 8 Wall. 15, and of the United states circuit court for the Northern District of Ohio, by Emmons, circuit judge, in the case of *The Avon*, 6 Chicago Leg. News, 41, that objection has no longer any force in our courts. This may be said to be especially so under the authority of the supreme court in the case of *The Eagle*, *supra*, in a case like the present, arising upon the great boundary waters between this country and British North America, constituting as they do great national thoroughfares, international in their character, and common to the vessels of both countries.

There are many decisions of the admiralty courts of the United States which have a bearing upon the question presented by the ground of defence here under consideration; but it would serve no useful purpose to enter into an analysis of them here. A few of the leading ones, as far as I have taken the time to examine them, are, however, here cited: *The Eagle*, 8 Wall. 15; *The Maggie Hammond*, 9 Ib. 435, 451; *The Avon*, 6

Chicago Leg. News, 41; *The Rebecca*, Ware, 191, 192; *The Phœbe*, Ware, 267, 268, 271; *Dupont* v. *Vance*, 19 How, 171; *The Boston*, Blatchf. & Howl. 325; *The Siren*, 7 Wall. 156, 158; *The Jerusalem*, 2 Gall. 349; *The Chusan*, 2 Sto. 466; *Pope* v. *Nickerson*, 3 Sto. 477; see also Abb. on Ship. 142 to 150; 2 Kent Comm. 8th ed. 281; 2 Pars. on Ship. & Adm. 322; Sto. Confl. of Laws, sec. 286 *c*.

The second proposition of the argument in support of the first ground of defence, viz.: that there was no lien and therefore no right of action *in rem* in this case, is not sustained; and with that the whole superstructure of the argument in support of that defence falls.

Second. The lien and jurisdiction to enforce it being maintained in favor of the original creditor, was the lien divested by the assignment of the claim?

Upon authority, I am clear that this question must be answered in the affirmative. It has been so held in every case in the federal admiralty courts to which my attention has been called, in which the decision was not evidently influenced by special circumstances.

In the case of *The Patchin*, 12 Law Reporter, 21, Judge Conkling, in a well reasoned opinion, so held in regard to mariners' wages. He notices a distinction between liens for wages and liens on bottomry bonds, and bills of lading which are assignable, on the grounds that the bond is an express hypothecation and binds the ship to the lender and his assigns; and that the bill of lading is negotiable, made so by law for the benefit of trade, and its transfer carries with it the title to the goods shipped, and of course the right to maintain a suit upon it in case of their loss; while, on the contrary, the right of the mariner to proceed against the ship in specie is conferred upon him for his own exclusive benefit, and arises by implication merely. He held that liens of the latter character are strictly personal. He recognizes that the claim or debt may be lawfully transferred, but holds that the lien does not follow.

In the case of *Reppert* v. *Robinson*, Taney's Decisions, 492, 498–9, the libel was *in personam* for repairs and supplies. In delivering his opinion, Chief Justice Taney said: "But if it appeared upon the proceedings that when the suit was brought Hamilton held this due bill as assignee, and the proceedings were instituted for his benefit, I do not think the admiralty jurisdiction could have been maintained; the right to sue in admiralty upon claims of this description is personal, and is maintained upon principles and for reasons which do not apply to the assignee." Certainly, if no jurisdiction *in personam*, there can be none *in rem*.

In the case of *The George Nicholaus*, Newb. 449, 454 to 457, the libel was *in rem* for salvage, and Judge McCaleb held that the same rule applies to liens for salvage as to those for wages, and that they are not assignable; citing with approbation Judge Conkling's opinion in *The Patchin*, *supra*.

In the cases of *The Æolian*, 1 Bond, 267, and *The Freestone*, 2 Bond, 234, 242, the libels were *in rem* for wages, and Judge Leavitt held the same as Judge Conkling in *The Patchin* and Judge McCaleb in *The Freestone*.

These are all the cases in the federal admiralty courts in which this doctrine has been maintained, to which my attention has been called or

that have fallen under my notice. There are, however, several cases in state courts, arising mostly under state statutes conferring liens where none existed by the maritime law, and in favor of mechanics and others, in which the same doctrine has been held. *Piersons* v. *Tincker*, 36 Me. 384, 386; *Hays* v. *Steamboat Columbus*, 23 Mo. 232; *Lovett* v. *Brown*, 40 N. H. 511; *White* v. *Levy*, 5 Eng. (Ark.) 411.

The cases in the federal admiralty courts which seem to hold the opposite doctrine will now be considered.

In the case of *The Boston*, Blatch. & Howl. 325, the libel was *in rem* for repairs, and Judge Betts held that an assignee of the debt for a full consideration, who became such *at the express instance of the master*, was entitled to all the legal remedies possessed by the original creditors, including the right to proceed against the vessel. There can be no doubt that the fact, that the transfer was made at the express instance of the master, had its influence, although it is not so stated in the opinion. At all events, it affords a reasonable explanation for the difference of opinion between that learned judge and the others whose opinions have been cited.

In the case of *The General Jackson*, 1 Sprague, 554, the libel was *in rem* for supplies, and Judge Sprague held that "the assignment of the claim, as security for a debt which had since been paid, would not of itself be a waiver of the lien." What his opinion would have been if the debt had not been paid, or if the assignment had been absolute instead of for security merely, the case does not inform us.

These are all the cases in the federal admiralty courts to which my attention has been called, or which have fallen under my notice, which even seem to hold that the lien is not divested by the assignment of the debt; and as to each of these cases it is to be observed that the decision was evidently influenced by special considerations.

As on the other side of the question, so here, there are also several state decisions, based in like manner on state statutes, holding the same way as the judgments last cited. *Hoyt* v. *Thompson*, 5 N. Y. (1 Seld.) 320, 327; *Sears* v. *Conover*, 34 Barb. 330; *Sorley* v. *Brewer*, 1 Daly, 79; *Iacge* v. *Brossieux*, 15 Grat. 83, 88; *Goff* v. *Papin*, 34 Mo. 180; *Tuttle* v. *Howe*, 14 Min. 145.

It is seen, therefore, that the decisions of our own admiralty courts upon this question are substantially all one way; and they fully sustain the position that the lien which a material-man has is strictly personal to himself and does not pass to his assignee; that it is in fact extinguished by the assignment of his claim so that neither he nor his assignee can come into a court of admiralty for its enforcement. I have not the time to devote to a discussion of the soundness of these decisions. It has, however, been so fully done by the learned judges in the opinions I have cited that there really does not appear to be much left to be said upon the subject. Even if I doubted the soundness of these decisions I should hesitate long before venturing a decision in opposition to so formidable an array of experience, learning, and ability. At all events, I should not do so except for cogent and conclusive reasons. Until overruled by higher authority, the rule of decision of these cases will be the rule of decision in this court.

In England the question does not seem to have been much discussed as

applied to maritime liens: at all events not sufficiently to have established a rule upon the subject. See Cross on Liens, 18 Law Lib. as to assignments of liens in general, and *The Wasp*, 1 Law Reporter, 367, Adm. & Eccl., as to assignments of maritime liens.

The proofs in this case showed that before this suit was brought, libellant had sold and transferred his claim to Johnson & Co., and that the suit was instituted by them, in libellant's name, but for their benefit. The lien was thereby lost, and the suit cannot be maintained.

In this view of the case a consideration and decision of respondents' third ground of defence has become unnecessary.

Libel dismissed, but without costs.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

[TO APPEAR IN 110 MASS.]

INJURY TO SERVANT THROUGH NEGLIGENCE OF AGENT OF CORPORATION. — SERVANT NOT DEBARRED FROM RECOVERING BY REASON OF VIOLATION OF RULES UNLESS INJURY CAUSED BY SUCH VIOLATION.

FORD v. *FITCHBURG RAILROAD COMPANY.*

One employed by a railroad corporation to drive a locomotive engine over its road may recover damages against the corporation for personal injuries caused by a defect in the engine, which was due to the neglect of the agents of the corporation charged with keeping the engine in proper repair, although the directors and superintendent had no reason to suspect negligence or incompetence on the part of such agents.

One employed by a railroad corporation to drive a locomotive engine over its road is not debarred from recovering damages against the corporation for injuries from an explosion caused by a defect in the boiler of the engine, by the fact that he was acting in intentional violation of the rules of the company, unless the accident was due, in whole or in part, to such violation; nor by the fact that such rules provided that the driver of an engine should be held responsible for the condition of his engine, must be sure that it was in good working order, and must immediately stop, draw his fire, station his signal men, and procure assistance, whenever any defect was detected in an engine that would make it in his judgment unsafe to proceed; nor by the fact that he knew the engine was not in good working order, if he did not know and ought not to have known that it was unsafe.

TORT to recover for personal injuries occasioned by the explosion of the boiler of a locomotive engine belonging to the defendants. Trial in the superior court, before Scudder, J. . . . .

At the close of the evidence, the defendants asked the judge to rule that there was no evidence to go to the jury in maintenance of the action; but the judge refused so to rule.

The defendants then asked the judge to give the following rulings: "1. The rules of the defendants, under which the plaintiff worked, con-

stituted a part of the contract of his employment, and any intentional violation of any of them by him would deprive him of any rights arising from the relation in which he stood to the defendants, so long as such violation continued. 2. Under the rules of the defendants, which prescribed the duty and ascertained the rights of the plaintiff, in respect to the operation of his engine, he was the absolute judge of whether, at any time, the engine was safe to proceed, and was in good running order; and in respect to those questions was wholly independent of Cooledge or Maddox, or any other employé of the defendants. 3. If the plaintiff knew, or had reasonable cause to believe, the engine to be unsafe [or not in good working order], he cannot recover. 4. If the defendants used reasonable care originally in furnishing a suitable and safe engine for their road, and in putting the same into the hands of fit and suitable agents to be kept in repair, they are not liable in this action for injury caused by any defect or want of repairs therein subsequently existing. 5. The plaintiff's knowledge, as shown by the evidence in this case, of the defective condition of the engine, and his continuing to use the same after such knowledge, is conclusive evidence of a want of due care on his part. 6. The plaintiff's knowledge that the engine was not in good order, and his using the same with such knowledge, is conclusive evidence of want of due care on his part; and if such knowledge and such use by him is proved by the evidence, he cannot recover. 7. The defendants are not liable in this case unless the plaintiff proves that the president, directors, or superintendent either personally knew, or, by the exercise of reasonable care in the performance of their duties, might have known of the existence of the defect in the engine, which caused the explosion; or unless the plaintiff proves that the president, directors, or superintendent either personally knew, or, by the exercise of reasonable care in the performance of their duties, might have known, that the person or persons employed to have the charge of the engine and keep it in repair were incompetent; and further proves that such incompetency caused the accident. 8. If the plaintiff violated any of the rules, and the accident would not otherwise have happened, he cannot recover. 9. Although Cooledge and Maddox failed, through incompetency, to make such examination of the boiler as the bulge in the back head, the condition of the stay-rods or throttle reasonably called for, and although, had they made such examination, the cause of the accident would probably have been discovered and the same prevented, still the defendants are not liable on that account. 10. The master mechanic was a fellow-servant of the plaintiff, and the defendants are not liable for the negligence, if any, of the master mechanic in failing to keep the engine in repair."

These rulings the judge refused to give, except the third, which he gave, omitting the words in brackets.

The judge, at the request of the defendants, also gave the following ruling: "If the plaintiff ran the engine when it was not in good working order, knowing it to be such; and the particulars in which it was not in good working order were signs of a defective condition in the boiler, causing an explosion, by which the plaintiff was injured, and a competent engineer ought to have known that such particulars were signs of such defective condition, and the plaintiff held himself out as such a competent

engineer when he entered into the employment of the defendants as an engineer, he cannot recover."

The judge instructed the jury as follows: "A person entering into the service of another takes upon himself, in consideration of the compensation to be paid him, the ordinary risks of the employment, including the negligence of his fellow-laborers." "The general rule is, that he who engages in the employment of another, for the performance of specific duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, embracing perils arising from the negligence of those in the same employ as incident to the service." "When a master uses due diligence in the selection of competent and trustworthy servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service." "A corporation is required to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which it requires of its servants, and is liable for damages occasioned by neglect or omission to fulfil this obligation, whether it arises from its own want of care, or that of its agents intrusted with the duty. But the law does not hold it responsible for the negligence of its servants, if of competent skill and experience, in using or managing the means and appliances placed in their hands in the course of their employment, if they are neither defective nor insufficient." "The rules of law are well settled, that a servant, by entering into his master's service, assumes all the risks of that service, which the master, exercising due care, cannot control, including those arising from the negligence of his fellow-servants; but that the master is bound to use ordinary care in providing suitable structures and engines and proper servants to carry on his business, and is liable to any of their fellow-servants for his negligence in this respect. This care he can and must exercise, both in procuring and in keeping and maintaining such servants, structures, and engines. If he knows, or in the exercise of due care might have known, that his servants are incompetent, or his structures or engines insufficient, either at the time of procuring them or at any subsequent time, he fails of his duty. For the management of his machinery and the conduct of his servants, he is not responsible to their fellow-servants; but he cannot avail himself of this exemption from responsibility, when his own negligence in not having suitable instruments, whether persons or things, to do his work, causes injury to those in his employ. He cannot divest himself of his duty, to have suitable instruments of any kind, by delegating to an agent their employment or selection, their superintendence or repair. A corporation must, and a master who has an extensive business often does, perform this duty through officers or superintendents; but the duty is his and not merely theirs, and for negligence of his duty in this respect he is responsible. To hold otherwise would be to exempt a master, who selected all his machinery and servants through agents or superintendents, from all liability whatever to their fellow-servants, although he had been grossly negligent in the selection or keeping of proper persons and means for conducting his business."

"The obligation of a corporation, so far as respects those in its employ-

ment, does not extend beyond the use of ordinary care and diligence. By ordinary care and diligence is meant such as men of ordinary sense, prudence, and capacity, under like circumstances, take in the conduct and management of their own affairs. This varies according to circumstances as the risk is greater or less, and must be measured by the character and risks and exposures of the business."

Applying the law as stated to the present case, the judge instructed the jury that "the exercise of ordinary diligence and care was required on the part of the defendants, and their proper officers and agents, in providing a suitable engine to be used by the plaintiff upon their road, and in keeping the engine in proper condition for such use; that the plaintiff was also required to exercise ordinary diligence and care in the use of the engine and in avoiding danger therefrom; that if neither party was in fault the plaintiff could not recover; that if the injury complained of was occasioned by the fault or negligence of both parties, the plaintiff was not entitled to recover; that if the defendants, acting by their proper officers and servants, exercised ordinary diligence and care in providing a suitable engine and in keeping the same in proper condition and repair, for the use to which it was appropriated, they were not responsible for the injury complained of; but that if they failed so to do, and the injury complained of resulted from their neglect in this respect, then the defendants were responsible therefor, unless it appeared that the plaintiff himself was also wanting in the exercise of ordinary vigilance and care, either in the management of the engine or in improperly exposing himself to danger therefrom, thereby rendering himself guilty of contributory negligence, in which latter case he was not entitled to recover; that the burden was upon the plaintiff to show, not only that the defendants were guilty of negligence in not exercising ordinary diligence and care in providing a suitable engine, and keeping it in proper condition, thereby causing the injury complained of, but that he was himself free from any negligence contributing to the injury; that Rule 28 did not, as a matter of law, release the defendants from their legal responsibility in this case, if any such existed, for the internal and invisible defects in the boiler, by which it was claimed the explosion was occasioned; and that the violation of Rule 42, so far as it stated it to be the duty of the plaintiff to be sure that the engine was in good working order before it was taken from the engine-house, did not, as matter of law, necessarily preclude him from recovering in this case, if otherwise entitled, unless the accident or injury complained of was occasioned in whole or in part by such violation."

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

H. B. Staples & F. P. Goulding, for the defendants. . . . .

G. A. Torrey, for the plaintiff.

COLT, J. This action is founded on the alleged negligence of the defendant corporation, in failing to provide and keep in repair a safe and suitable engine to be run by the plaintiff in his employment as locomotive engineer upon its road. The law applicable to cases of this description, and which defines the rights and duties that belong to the relation of master and servant, is plainly stated in the recent decisions of this court. The principles are discussed and the cases sufficiently reviewed in

Coombs v. *New Bedford Cordage Co.* 102 Mass. 572; and in *Gilman* v. *Eastern Railroad Co.* 10 Allen, 233; 13 Allen, 433; and *Huddleston* v. *Lowell Machine Shop*, 106 Mass. 282.

Upon a careful consideration of the evidence and the instructions given, we find no error in law for which this verdict should be set aside. The legal principles which govern the case were accurately stated. They were well adapted to the whole evidence in its different aspects, and they were all that the case required. The jury, who are presumed to have been controlled by these instructions and the evidence before them, must have found, in arriving at their verdict, that the defendant corporation, by its agents intrusted with that duty, did not exercise ordinary care and diligence, in supplying and maintaining an engine, safe to be used for motive power upon their road, in the performance of that part of the plaintiff's work in which he was engaged at the time; that this neglect was the cause of the injury; and that the plaintiff was himself in the exercise of ordinary care and diligence, in the use of the engine and in avoiding danger therefrom. They must have further found, that the plaintiff did not know, or have reasonable cause to believe, that the engine was unsafe at the time of the explosion, and also that the injury was not, in whole or in part, caused by any violation of the terms of his contract of employment, as expressed in the rules of the road assented to by him.

This establishes the defendant's liability. It is enough that there was evidence in support of these several findings sufficient to justify each. It is not a question of the weight of evidence, or whether the verdict ought not to be set aside on a motion for a new trial. When the question is raised by exceptions, the only inquiry is, whether there is any evidence proper to submit to the jury as having a tendency to support the legal propositions which charge the defendant with liability. *Forsyth* v. *Hooper*, 11 Allen, 419.

The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one, the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other, he may.

There was no error in refusing to instruct the jury as specifically requested. The first ruling asked would absolve the defendant from any duty to the plaintiff, in case of his violation of any rule which he had

agreed to observe. Such violation would perhaps justify the defendant in putting an end to the relation, if it saw fit. But until so terminated, the defendant must be held to the legal responsibilities assumed.

The second instruction asked, as to the effect of the rules referred to, in imposing the sole responsibility upon the plaintiff, was not warranted by their true meaning. Rule 28 clearly refers to accidents on the road which would make it unsafe to proceed; and Rule 42 imposes upon the engineer the duty of seeing that his engine is in good working order. The jury were told that the first of these rules did not relieve the defendant from responsibility for internal and invisible defects in the boiler, and that the last would not preclude the plaintiff from recovering, unless the injury complained of was occasioned, in whole or in part, by such violation; but that, if the plaintiff knew, or had reasonable cause to believe, the engine to be unsafe, he could not recover.

As to the third, fifth, and sixth rulings asked, it is plain that the plaintiff's knowledge that the engine was not in good working order, and was to some extent defective, is not conclusive evidence of want of due care on his part. It was for the jury to consider on the question of the alleged contributory negligence of the plaintiff; and they were told that if the plaintiff ran the engine when it was not in good working order, knowing it, and knowing that its condition was a sign of the defect which caused the explosion by which he was injured, or when, as a competent engineer, he ought to have known it, he could not recover. The fact that it was in violation of an express rule is not material, unless such violation was a direct cause of the injury. *Clarke* v. *Holmes*, 7 H. & N. 937.

The fourth and seventh requests, so far as they differ from the instructions given, were deficient. The corporation is equally chargeable, whether the negligence was in originally failing to provide, or in afterwards failing to keep, its machinery in safe condition. The duty is essentially the same, and no sound distinction can be established in favor of the defendant on this ground; and for the rest, the question was not whether the officers named knew, or might have known, of the defect, or of the incompetency of those who had charge of the repairs, but whether the corporation in any part of its organization, by any of its agents, or for want of agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use.

The ninth and tenth instructions asked assume that the plaintiff's injury was caused by the incompetency of fellow-servants. But the action is for failing in the exercise of ordinary care to provide a suitable engine for his use in the work required. This involves an inquiry into the existence and character of the defect, the sufficiency of the means employed for its discovery and removal, the duties required of those charged with the work of providing and keeping in safe working order the motive power of the road, and the fidelity with which these duties were discharged. This all concerns the obligations imposed upon the master, and the jury may have found for the plaintiff without regard to the competency or incompetency, the care or the negligence, of the officers named. The instructions given were all that were required. *Exceptions overruled.*

CIRCUIT COURT OF THE UNITED STATES. — DISTRICT OF CALIFORNIA.

[SEPTEMBER, 1874.]

TAX DEED. — CLOUD ON TITLE. — INJUNCTION TO RESTRAIN COLLECTION OF TAX.

MINTURN v. *SMITH.*

1. *A general statute authorizes a tax collector for state and county taxes to execute a deed upon a tax sale, and further provides that such deed shall be primâ facie evidence of certain facts recited therein, and conclusive evidence of the regularity of the proceedings in all other respects. A subsequent statute provides that a town tax in a certain town shall be assessed and collected at the same time, and in the same manner, as provided by said general act, and confers upon the town treasurer all the powers exercised by the tax collector of the state and county taxes under the general act, but makes no provision as to the effect of the tax deed executed by the town treasurer. Held, that such deed will not be primâ facie evidence of the regularity of the prior proceedings.*
2. *A tax deed which the statute does not make primâ facie evidence of the regularity of the assessment and sale does not cast a cloud upon the title.*
3. *An injunction will not be granted to restrain the collection of a tax, when the deed issued upon a sale for taxes would not cloud the title.*

THE facts appear in the opinion.

Mr. *W. W. Crane*, for complainant.

Mr. *G. W. Tyler*, *contra.*

SAWYER, J. The question in this case is, whether a deed issued by the treasurer of the town of Alameda, upon a sale for town taxes under the act of 1872 to incorporate the town of Alameda, would be *primâ facie* evidence of title, and would therefore cast a cloud upon the title. Section seven of the act is as follows: —

"The annual tax authorized by this act to be levied by the board of trustees shall be levied, assessed, and collected at the same time, and in the same manner, as is, or may be by law provided for the levying and collecting state and county taxes, within the county of Alameda, the treasurer being hereby vested with the same powers to make collections for taxes as is, or shall be, conferred upon tax collectors for the collection of state and county taxes within said county."

This is the only provision of the act affecting the question. The general provisions of the Political Code relating to the collection of state and county taxes have no application, except so far as they are made applicable by said section seven. The general statute is made applicable, so far as the mode, manner, and time of assessing and collecting the tax is concerned, and the treasurer, with respect to the town tax, is vested with all the powers that are conferred upon tax collectors of state and county taxes by the Political Code, but it goes no further. The town treasurer may sell for town taxes legally levied, and execute a deed in pursuance of

such sale, because the tax collector of state and county taxes may do so. The power of the treasurer is spent when he has executed the deed.

Section seven does not say what the effect of that deed shall be. It does not provide that it shall have any other effect than ordinary deeds executed by public officers upon tax sales. The general act does not stop with authorizing the tax collector to execute the deed prescribed, but goes on in sections 3786 and 3387, to provide, that the deed so executed by the tax collector shall be *primâ facie* evidence of title in the grantee as to certain enumerated particulars, and conclusive evidence as to all others. This is something outside, and beyond the powers of the tax collector. It is intended to change a rule of evidence — to shift the burden of proof as to the regularity of the proceedings resulting in the tax deed from the claimant *under*, to the party claiming *against*, the tax deed.

The act, under which the tax in question is levied, stops short of the effect of the deed as an instrument of evidence. Its says nothing about its effect, but ends with the powers of the treasurer. Without such provision the deed can only have the effect of ordinary tax deeds. The act must be strictly construed, as it assumes to divest title to land *in invitum*. That such is the rule is clear from the principal authority cited by complainant, *Selby* v. *Smith*, 2 Mich. 487. In that case the statute, besides the provision that the officers should proceed in the same manner and exercise the same powers as the officers under the general act, adds, "and in *all respects, with the like effect.*" It was upon this clause alone that the title was sustained. See, also, 1 Blackford, 336; Blackwell on Tax Titles, 449 *et seq.*, and cases cited. We do not think the deed which the treasurer is authorized to issue would have the same effect as evidence as a deed executed by the tax collector under the general law. It would not be *primâ facie* evidence of title, and consequently would not cast a cloud upon the title. This is settled by numerous decisions in this State. *Huntingdon* v. *Central Pacific R. R. Co.* 2 Sawyer; *S. C.* 1 Am. L. T. R. N. S. 94, and cases cited. There is, therefore, no ground for an injunction. *Motion for injunction denied.*

Mr. Justice FIELD concurred.

SUPREME COURT OF ILLINOIS.

[TO APPEAR IN 63 ILL.]

HUSBAND AND WIFE. — SUIT BY WIFE. — LANDLORD AND TENANT. — EVICTION DEFINED.

HAYNER v. *SMITH.*

1. *Since the act of* 1861, *in a suit to recover rent under a lease executed by a married woman on her own separate property, it is error to join her husband as plaintiff in the action.*
2. *Where a lessee is, by his lessor, wrongfully evicted from a portion of the demised premises, he is thereby excused from the payment of any of the rent, although*

he remains in possession of the remaining portion of the premises to the end of the term.

3. *But, to constitute an eviction, there must be more than a mere trespass by the landlord. There must be something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the premises — the question of eviction or no eviction depending upon the circumstances, and being a matter for the jury to decide.*

4. *Some acts of interference by the landlord with the tenant's enjoyment of the premises may be mere acts of trespass, or may amount to an eviction, the question whether they partake of the latter character depending upon the intention with which they are done — if clearly indicating an intention on the landlord's part that the tenant should no longer continue to hold the premises, they would constitute an eviction.*

APPEAL from the Alton city court; the Hon. Henry S. Baker, Judge, presiding.

Mr. *Charles P. Wise*, for the appellants.

Mr. *William S. Field*, *contra*.

Mr. Justice BREESE delivered the opinion of the court.

This was an action originally brought before a justice of the peace in Alton, in the county of Madison, by John H. Smith and Elizabeth Smith, against appellants, to recover the monthly rent claimed to be due on a written lease executed by Elizabeth Smith to appellants.

The judgment by the justice of the peace was in favor of the plaintiffs, from which the defendants appealed to the Alton city court, where a like judgment was rendered. To reverse this judgment the defendants appeal to this court.

The first point made by appellants is, that the lease was executed by Elizabeth Smith to appellants' assignors, and she alone should have brought the action.

This point is well taken, for, although John H. Smith may be the husband of Elizabeth, and was so at the time of executing the lease, he did not sign it, nor was the ownership of the property in him. It was in his wife in her own right. No joint cause of action was established, and there was no undertaking to pay rent to the plaintiffs. There was, therefore, a variance between the cause of action and the evidence. It was payable to Elizabeth Smith in her own right, and she alone must sue. *Emerson* v. *Clayton*, 33 Ill. 497; *C. B. & Q. R. R. Co.* v. *Brown*, 51 Ib. 206.

The very object and purpose of the act of 1861, commonly called the "Married Woman's Act," would be defeated, should the husband join in an action to recover the property of the wife, for in such case he could control the recovery and deprive the wife of its enjoyment.

This disposes of the case, and must reverse the judgment.

It is suggested that another action may be brought by the proper party, and it is desired this court should state the principles which should govern it.

The defence to the action was that, after the demise, John H. Smith, who it is proved controlled the property for the lessor, took possession of a building on the premises erected by the lessees for a drying house, and used it as a stable, and the entire lot as a cattle yard, without the consent of the lessees; that these acts of the lessor amounted to an eviction, and discharged the lessees from the payment of rent for the unexpired term.

There is a covenant in this lease for the quiet enjoyment of the whole of the demised premises; but if there was not such a covenant, such enjoyment, without any protestation by the landlord, would be implied in the condition on which the tenant is bound to pay the rent. The law implies covenants against such acts of the landlord as destroy the beneficial enjoyment of the premises leased. *Wade* v. *Halligan*, 16 Ill. 507.

Forcible expulsion of the tenant is, of course, an eviction, and may terminate the tenancy.

There is much diversity of opinion in the books on the question of a constructive eviction and the consequences flowing from it. Some courts have held that an actual eviction of the lessee by a title paramount, or by the lessor himself, would alone justify the lessee in resisting the payment of rent, whilst other courts go further, and hold that an eviction from a part of the leased premises by the act of the landlord will justify the tenant in abandoning the premises, and thus discharge himself from liability for rent; and other equally reputable courts have said that any act of the lessor which defeats the enjoyment of the entire property by the lessee, though he may continue in possession of the part not intruded upon by the lessor, would be a bar to the recovery of the rent. It is unnecessary to collate these authorities; it is sufficient to say they are not entirely harmonious.

In a case similar to this in all respects, between the same parties, before this court at a former term, in disposing of the instructions given in that case, the second, given on behalf of the lessees defendants, to this effect, was held to be proper: The principle upon which a tenant is required to pay rent is the beneficial enjoyment of the premises unmolested in any way by the landlord; and if the jury believe from the evidence that the plaintiff took possession of any part of the premises leased by her to the defendants, against their consent, then in law it is an eviction, and releases the defendants from the payment of any more rent, and they will find for the defendants. The fourth and seventh instructions were substantially the same.

In addition to the authorities cited in that case, *Briggs* v. *Hall*, 4 Leigh (Va.), 484, may be referred to. In that case a farm was let for one year, and the landlord entered on a meadow, parcel of the premises, within the year, and cut and carried away the hay without the consent and against the will of the tenant, who, nevertheless, continued to occupy the farm during the residue of the year. It was held, the landlord, by such disturbance of the tenant, lost the benefit of the entire contract, and was not entitled to recover any part of the rent. A reference is made to *Smith* v. *Raleigh*, 3 Campb. 553, in which Lord Ellenborough said, "An eviction from part of the demised premises is a complete answer to the action."

In *Dyatt* v. *Pendleton*, 8 Cowen, 727, the court of errors of New York recognize a distinction found in the books where an eviction is by a third person, or by the landlord. A legal eviction of the tenant by a third person excuses the payment of rent; so does any eviction by the lessor. If the eviction be partial, by a third person, the rent will be apportioned, but a partial eviction by the lessor excuses from the payment of the whole rent.

The principle is, that a party who deprives another of the consider-

ation upon which his obligation is founded cannot, in general, recover for a violation of that obligation.

In *Leishman* v. *White et al.* 1 Allen (Mass.), 489, which was an action for use and occupation of a tenement hired by the defendants to the plaintiff, as set out in the first count of the declaration, and in another count, a lease was set out by which plaintiff leased to the defendants a hotel near Spot Pond, with the lands adjoining, and an island in the pond, for five years, at the yearly rent of two hundred and fifty dollars, payable quarterly.

The defendants, among other things, set forth in their answer an eviction by the lessor from a portion of the premises. Evidence offered on the trial, to show the defendants were evicted from a part of the premises, was refused, the court holding that such eviction, if proved, would only bar the plaintiff's claim *pro tanto*, and that he might still recover a proportionate share of the rent according to the ratable value of the portion of the premises from which the defendants were not evicted.

On appeal to the supreme court, it was held, the action could not be maintained if the defendants proved they had been evicted from a part of the demised premises by the plaintiff. The court say: "In such case, no recovery can be had on the covenant to pay rent, because the defendant has been deprived of the beneficial enjoyment of a portion of the estate by the tortious act of the lessor, and the covenant being entire, cannot be severed or apportioned so as to allow the plaintiff to recover a part of the rent reserved by the lease."

The same doctrine was held by the same court in *Shumway* v. *Collins*, 6 Gray, 232.

In *Christopher, Ex'r*, v. *Austin*, 1 Kernan (N. Y.), 216, it was said: "A wrongful eviction by the landlord from a part of the demised premises suspends the rent until the possession is restored, and the landlord cannot recover a portion of the rent agreed upon, or any compensation for the part of the premises occupied by the tenant while the eviction continued."

Further reflection and a closer examination of the authorities have satisfied us that these instructions require some modification.

As was said in the court of common pleas, by Jervis, Lord Chief Justice, in *Upton* v. *Townsend*, 84 Eng. C. L. 30, and *Same* v. *Greenleaf*, Ibid.: "It is extremely difficult, at the present day, to define with technical accuracy what is an eviction. The word eviction was formerly used to denote an expulsion by the assertion of a title paramount, and by process of law. But that sort of an eviction is not necessary to constitute a suspension of the rent, because it is now well settled that, if the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended. The term 'eviction' is now popularly applied to every class of expulsion or amotion." This eminent judge further says: "I think it may now be taken to mean this — not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises." The question, therefore, of eviction or no eviction depends upon the circumstances, and is in all cases to be decided by the jury.

Williams, Justice, in the same case, in delivering his opinion, said: "Considering how frequently transactions of this sort are taking place, it is somewhat remarkable that so little is to be found in the books upon the subject of eviction. There clearly are some acts of interference by the landlord with the tenant's enjoyment of the premises which do not amount to an eviction, but which may be either acts of trespass or eviction, according to the intention with which they are done. If those acts amount to a clear indication of intention on the landlord's part that the tenant shall no longer continue to hold the premises, they would constitute an eviction."

We are inclined to think the true rule is announced in these cases last cited. The court below will so give instructions in the case as shall conform to it, on the trial of another action brought by the proper party.

For the reasons given, the judgment below is reversed.

Judgment reversed.

CIRCUIT COURT OF THE UNITED STATES. — DISTRICT OF MASSACHUSETTS.

[SEPTEMBER, 1874.]

ESTOPPEL OF BANK, BY SIGNING BLANK TRANSFER, TO SET UP FORGERY. — NEGLIGENCE.

MATTHEWS v. *MASS. NATIONAL BANK.*

An altered certificate was deposited with defendant, by a third party, as collateral for a loan and the usual printed form of transfer on the back thereof, signed by their cashier. It subsequently came into the hands of plaintiff, who took it in good faith and relying upon the cashier's signature, and who, upon discovering the fraud, brought suit against defendants. Held, that the bank by signing the blank transfer had so far warranted the genuineness of the certificate that it was estopped from setting up forgery as a defence.

Held, also, that it was negligence in the bank to transfer the certificate in blank instead of to the party who deposited it by name.

THE facts are set forth in the opinion.

Messrs. *Dwight Foster & G. W. Baldwin*, for plaintiff.

Messrs. *Joshua P. Converse & E. A. Kelley*, *contra.*

SHEPLEY, J. The defendant, the Massachusetts National Bank, loaned to one James A. Coe twenty-two thousand dollars payable on call with interest, taking from him his memorandum of indebtedness for that sum, with, as collateral security therefor, what purported to be a certificate of two hundred shares of the capital stock of the Boston & Albany Railroad Company issued to said Massachusetts National Bank, as collateral.

This instrument was originally a genuine certificate for two shares of the capital stock of the Boston & Albany Railroad Company issued to H. E. Coe, but by false and forged erasures and interlineations had been so altered as to purport to be a certificate for two hundred shares of its

stock issued by said railroad corporation to the Massachusetts National Bank, as collateral.

The bank received the said certificate in good faith and without any suspicion of its fraudulent character, and in supposed fulfilment of the promise of James A. Coe to give as security for the loan aforesaid two hundred shares of the capital stock of said railroad corporation.

Subsequently, on payment by said Coe to the bank, he received back his memorandum of indebtedness, and the cashier of the bank, for the purpose and with the intention of restoring the collateral to Coe, returned to him the fraudulent certificate with the usual printed form of transfer on the back thereof signed by H. K. Frothingham, cashier of said bank, in blank.

About two weeks after the surrender by the bank of this certificate to Coe with the transfer in blank of the cashier on the back of it, the plaintiff, Matthews, pursuant to his agreement to loan Coe twenty-five thousand dollars on call with interest, received from Coe, in good faith, the said fraudulent certificate with the blank assignment on the back thereof, supposing the same to be a genuine certificate for two hundred shares of said stock issued by the corporation and duly transferred and assigned so as to enable him to obtain a new certificate therefor in his own name, and on receipt thereof loaned the sum of twenty-five thousand dollars. The signature of the cashier was well known to Matthews, who correctly supposed the signature on the blank assignment to be genuine. Coe was tried and convicted for obtaining money by false pretences, and indictments for forgery are now pending against him, and he has been declared bankrupt. The next day, or very soon after the day when the money was loaned by Matthews, the fact first became known to plaintiff and defendant of the fraudulent alteration of the certificate before it came into the possession of defendant, and plaintiff thereupon notified the bank that he should hold it responsible for any loss sustained by him by reason of the premises. This action is brought for the recovery of the damages thus sustained.

The real question presented in the case is whether the bank, by signing the blank transfer, has so far warranted the genuineness of the certificate that it is estopped from setting up the forgery as a defence to this action.

Defendant denies that the cashier had authority or right to bind the bank by the contract declared on.

Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business conducted by the bank. Their acts, within the scope of such usage, practice, and course of business, will in general bind the bank in favor of third persons possessing no other knowledge. *Morse, Jr., et al.* v. *Mass. National Bank*, U. S. Circuit Court, Mass. Dist.; *Miner* v. *The Mechanics' Bank*, 1 Peters, 70; *Merchants' Bank* v. *State Bank*, 10 Wallace, 604. One of the ordinary and well known duties of the cashier of a bank is the surrender of notes and securities upon payment; and his signature to the necessary transfers of securities or collaterals when in the form of bills of exchange, choses in action, stock certificates, or similar securities for loans, which are personal property is an act within the scope of the general usage, practice, and course of business in which cashiers of a bank

are held out to the public as having authority to act. Undoubtedly the ordinary duties of a cashier do not comprehend the making of a contract which involves the payment of money, without an express authority from the directors, unless it be such as relates to the usual and customary transactions of the bank. But the transfer of certificates of stock held as collateral is certainly one of the usual and customary transactions of banks, and the public would be no more likely to require evidence of a special authority to the cashier to make such transfer than of a special authority to draw checks on other banks, or to perform any other of the daily duties of his office.

The signature of the cashier must therefore be considered as the signature of the bank, and the question returns whether such blank assignment on the back of the certificate by the bank be so far a warranty of the genuineness of the certificate that the bank is estopped from setting up the forgery as a defence. In the case of forged negotiable instruments it is well settled that the indorser warrants that the instrument itself and the antecedent signatures thereon are genuine. Story on Promissory Notes, sec. 125; *State Bank* v. *Fearing*, 16 Pick. 533; *Hortsman* v. *Henshaw*, 11 Howard, 184; *Cricklow* v. *Parry*, 2 Camp. 182; *Canal Bank* v. *Bank of Albany*, 1 Hill, 287. The indorser's liability in these cases is properly placed upon the ground of estoppel. "This proceeds," says Judge Story, "upon the intelligible ground that every indorser undertakes that he possesses a clear title to the note deduced from and through all the antecedent indorsers, and that he means to clothe the holder under him with all the rights which by law attach to a regular and genuine indorsement against himself and all the antecedent indorsers. It is in this confidence that the holder takes the note without further explanation, and if each party is equally innocent and one must suffer, it should be the one who has misled the confidence of the other, and by his acts held out to the holder that all the indorsements are genuine and may be relied on as an indemnity in case of the dishonor thereof." This is a statement of the grounds upon which the rule of law rests as applicable to negotiable instruments, but the reasoning would seem to apply with equal force and pertinency to the case of a transfer of a certificate of stock by indorsement in blank. Stock certificates are sold in open market like other securities, and form the basis of commercial transactions. In the language of Mr. Justice Davis, in *Bank* v. *Lanier*, 11 Wallace, 377, "Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable." In *Leitch* v. *Wells*, 48 N. Y. 613, it is said, "Since the decision of the case of *McNeil* v. *Tenth National Bank*, certificates of stock, with blank assignments and powers of attorney attached, must be nearly as negotiable as commercial paper." The common practice of passing the title to stock by delivery of the certificate, with the blank assignment and power, has been repeatedly proved and sanctioned in cases which have come before the courts in New York. In *New York & New Haven Railroad Co.* v. *Schuyler*, 34 N. Y. 41, the rights of parties claiming under such instruments were fully recognized by the court, and such mode of transfer was shown to be the common practice in the city of New York. It is well settled that the form of assignment printed on the back of stock certificates, when signed in

blank, may be filled up by a subsequent purchase of the stock. *Kortright* v. *The Commercial Bank of Buffalo*, 20 Wend. 91, and 22 Wend. 348; *Bridgeport Bank* v. *N. Y. & N. H. R. R. Co.* 30 Conn. 273. The certificate in this case, as it came from the bank, contained on the same piece of paper, and on the back of the certificate a blank assignment, which was all that was necessary to transfer the title of the stock as between the parties. The defendant must, therefore, be held to have intended and agreed that whoever should present the certificate so issued from the bank, with the assignment executed in blank, should be entitled to fill up the blanks with his own name, and to have a transfer of the stock made to himself on the books of the company. The certificate accompanied with the transfer, executed in blank, has a species of negotiability of a peculiar character, but one well recognized in commercial transactions and judicial decisions, and absolutely essential in the usage and necessities of modern commerce to make such certificates available in commercial transactions. Even when such blank assignments, or powers of attorney to transfer stock, are under seal, the blanks may be filled up according to the agreement of the parties at the time. *Bridgeport Bank* v. *N. Y. & N. H. R. R. Co.* 30 Conn. 274–5. Redfield on Railways, sec. 35, and cases cited. The decisions to the contrary in the English courts have not been followed in this country, and they were influenced not merely by a rigid adherence to the technical rules of the common law in relation to instruments under seal, but by the policy of the stamp system. But the case of *Walker* v. *Bartlett*, 36 Eng. L. & Eq. 368, and later English decisions, recognize the validity of blank transfers of stock, and that such transfers of stock impose upon the holder of them the obligation to pay calls upon the shares while they remain his property. In *Kortright* v. *The Buffalo Commercial Bank*, 20 Wendell, 93, speaking of the filling up of a blank transfer of stock and power of attorney, Nelson, C. J., after stating that this is in strict conformity with the universal usage of dealers in the negotiation and transfer of stocks according to the proof in the case, goes on to say, "Even without the aid of this usage, there could be no great difficulty in upholding the assignment. The execution in blank must have been for the express purpose of enabling the holder, whoever he might be, to fill it up. If intended to have been filled up in the name of the first transferee, there would have been no necessity for its execution in blank; Barker might have completed the instrument."

The right to fill the blank in a blank transfer of stock is recognized by the supreme court of Massachusetts in *Sewall* v. *The Boston Water Power Co.* 4 Allen, 277.

Matthews clearly had the right, having advanced the sum of twenty-five thousand dollars upon the supposed security of this blank assignment of stock, to fill up the blank with his own name and with the place of his residence and whatever was necessary to make the instrument complete as an assignment and transfer to him of the shares described in the certificate. The case finds that the cashier signed the assignment in blank for the purpose and with the intention of restoring the pledge to Coe. But even if he went further and agreed with Coe that Coe should fill the blank with his own name, such private understanding between him and

Coe would not have affected the rights of third parties who parted with their property in good faith, without negligence, upon the faith of the certificate of the cashier that the bank undertook to assign, and did assign, to whoever might be the lawful holder of the instrument, the amount of stock described therein.

As above quoted from C. J. Nelson, "If intended to have been filled up in the name of the first transferee, there would have been no necessity for its execution in blank;" Frothingham "might have completed the instrument." What possible explanation can be given of the course of the cashier in giving to Coe an assignment in blank, rather than a transfer to Coe himself, other than to enable Coe to dispose of the certificate so that the holder could take his title directly from the bank, and that the instrument might be used according to the well known usage of dealing with stock certificates, passing from one purchaser to another without the inconveniences and delays consequent upon manifold transfers on the records of the corporation? If the bank intended to limit the assignment to a particular assignee, or to a less number of shares than the number described in the certificate, the limitation should have appeared in the assignment. The assignment in blank purports to assign what is described in the certificate to the lawful holder, whoever he may be, who may fill the blank. The signature is given for the purpose of transferring title, and whenever the blank is filled a contract of sale is established between the party who has signed the blank assignment and the person whose name is rightfully filled in as assignee.

It is contended in behalf of the bank that the transfer in blank created no liability or obligation on the part of the bank to Matthews, because the circumstances under which the certificate was received by the bank and surrendered to Coe indicate clearly that the act of the cashier in signing and transferring the certificate to Coe was performed with the intention of restoring the pledge to Coe, in discharge of the duty of the bank as pledgee, after the purposes of the pledge were answered, and not with any purpose of a sale of the certificate or the stock supposed to be represented by it. But there is nothing in the case to show any knowledge on the part of Matthews of any such intention on the part of the cashier. The certificate purports to be a certificate that the bank held the shares as collateral, but does not show that they were collateral for a debt of Coe's to the bank. Such a certificate of stock with the transfer in blank of a responsible bank might, in the ordinary course and usage of dealing in stocks, pass through the hands of many successive purchasers. The possession of the certificate would afford no indication that the holder of it was the person who had originally transferred it to the bank as collateral. If Coe had consented to a sale by the bank of the collateral to pay his debt, or if the bank had in any way acquired the right to sell it and had sold it, if the assignment had been in blank, the purchaser would have been in the same condition, and Matthews, in dealing with such a purchaser, would have received no better evidence of title against the bank than he received from Coe. Had the bank desired to sell this stock and placed it in the hands of a broker with a blank transfer in the usual course of business, Matthews in buying from the broker would have received no better evidence of title against the bank than in the present case. The

mere words "as collateral" in the instrument do not tend to put the purchaser on inquiry, except so far as relates to the authority of the bank to dispose of the collateral as between the bank and its debtor. If this inquiry had been made it would only have resulted in the information that the assignment was made in its actual form by the joint act and consent of the debtor and the bank. The name of the pledger was not stated in the certificate as is required by the statute of Massachusetts. Gen. Statutes of Massachusetts, ch. 68, sec. 13. In fact, if Matthews had gone to the bank to make inquiries, he could only have learned that Coe having paid his debt to the bank, the certificate had been surrendered to him by the bank with a transfer in blank. There would have been nothing in this information to lead him to doubt the genuineness of a certificate to which the bank had given currency by its signature, and on the faith of which he would have learned the bank had loaned twenty thousand dollars which had been paid. The bank or the cashier did not then doubt the genuineness of the instrument, and no inquiry at the bank would have inspired doubts in the mind of Matthews, there being no such doubts in the minds of the officers of the bank. Nor is it perceived how the bank can contend with any show of reason that Matthews was negligent in not inquiring at the office of the railway corporation. If the duty of making such an inquiry was incumbent on any one, it was surely incumbent on the bank to ascertain the genuineness of the instrument before they gave currency to it and lulled suspicion and doubt by the responsibility of their own signature. The answer to all the positions taken by the defendent as to notice to Matthews from the words "as collateral" in the instrument is, that there is nothing to connect Coe with those words. There is nothing on the face of the papers, and there was nothing in the fact of the possession of the instrument by Coe, to show that he was the person for whose debt the stock was held as collateral.

Had not Matthews a right to suppose, upon receiving this certificate, authenticated by the signature of the bank, that they had obtained the certificate themselves from the railroad company in the usual way, thus preventing the possibility of fraud or forgery before receiving it as collateral for a loan, and before authenticating it with their signature? It is difficult to see in what respect Matthews was negligent.

The defendant, on the other hand, negligently placed confidence in Coe to obtain a transfer from the railroad company of the two hundred shares on which they loaned the sum of $25,000, instead of taking their certificate directly from the company. But the negligent act which especially imposes upon them a liability in this case is, that they delivered the forged instrument to Coe, authenticated by their signature in blank to a transfer, thus giving to it a currency and negotiability which it would not have possessed had they made the transfer directly to Coe. Thus the bank put it in the power of Coe to commit the fraud on Matthews, on which this suit is founded.

In *McNiel* v. *The Tenth National Bank*, the language of the opinion is precisely applicable to a case like the present. "Such, then, being the nature and effect of the documents with which the plaintiff intrusted his brokers, what position does he occupy towards persons who, in reliance upon those documents, have, in good faith, advanced money to the brokers

or their assigns on a pledge of the shares? When he asserts his title, and claims, as against them, that he cannot be deprived of his property without his consent, cannot he be truly answered that by leaving the certificate in the hands of his brokers, accompanied by an instrument bearing his own signature, which purported to be executed for a consideration, and to convey the title away from him, and to empower the bearer of it irrevocably to dispose of the stock, he in fact 'substituted his trust in the honesty of his brokers for the control which the law gave him over his own property,' and that the consequences of a betrayal of that trust should fall upon him who reposed it, rather than upon innocent strangers from whom the brokers were thereby enabled to obtain their money?" If the bank only intended to revest in Coe whatever it acquired from him, it would have been perfectly easy to have limited the transfer to that extent only. A private understanding that such was the intention between Coe and the cashier could not affect the rights of those who, if misled, were misled by the acts of the bank. If the bank, by giving Coe the transfer in blank with their signature, exhibited him to the money dealing public as having the competent right of pledge and disposal, with all the usual evidences of such right, it substituted their trust in the honesty of Coe for the control which the bank should have exercised itself over the transfer of the instrument, and should suffer the loss consequent upon his betrayal of the trust, rather than to suffer it to fall upon an innocent stranger.

If the conditions upon which the apparent right of control which the bank conferred upon Coe were not expressed on the face of the instrument, but remained in confidence between the bank and Coe, the case is not distinguishable in principle from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power. *Jarvis* v. *Rogers*, 15 Mass. 389; *Pickering* v. *Burk*, 15 East, 38; *Fatman* v. *Loback*, 1 Duer, 354; *N. Y. & N. H. R. R. Co.* v. *Schuyler*, 34 N. Y. 41.

One of two innocent parties must suffer in this case by the fraud of Coe. Under similar circumstances, courts have repeatedly held that the party must suffer who has exhibited the greater degree of negligence. The leading case on the indorsement of bills of lading, *Lickbarrow* v. *Mason*, 2 Term Rep. 63, is authority on this point. See, also, *Lobdell* v. *Baker*, 3 Met. 469; *Polhill* v. *Waller*, 3 Barn. & Adol. 114.

The bank is precluded from setting up the fact of the forgery of the instrument, because it would be a wrong on its own part and an injury to others whose conduct has been influenced by the acts and omissions of the bank. Swayne, Justice, in *Merchants' Bank* v. *State Bank*, 10 Wall. 645, says "Estoppel *in pais* presupposes an error or a fault, and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon another." Mr. Justice Clifford recognizes this principle in his dissenting opinion in that case: "If a bank may be held liable in any case upon a certificate of their cashier that a check is good when they have no funds of the drawer, it is not because the cashier is authorized to make such certificate, but because the bank is bound by his representation, notwithstanding it is false and unauthorized." An estoppel is a sal-

utary rule which prevents a man from proving that to be false which he has previously asserted to be true when others have acted on the faith of his representation.

The fact that Matthews has also a right of action against Coe, who is a convict and a bankrupt, does not preclude him from a remedy against the bank. *Gurney* v. *Wormsley*, 4 El. & Bl. 133.

Upon the facts as agreed in this case the plaintiff is entitled to judgment, and, according to the agreement of the parties, the case is to be referred to an auditor to assess the damages.

CIRCUIT COURT OF THE UNITED STATES. — SOUTHERN DISTRICT OF NEW YORK.

[MAY, 1874.]

PATENT. — CONCERNING THE PROSECUTION OF SUITS IN ANOTHER DISTRICT FOR ARTICLES SOLD BY A DEFENDANT WHO HAS BEEN ORDERED TO ACCOUNT.

RUMFORD CHEMICAL WORKS v. *HECKER.*

Where a plaintiff has obtained a decree for an account for infringement of a patent, and institutes proceedings against parties residing in other districts who have purchased the infringing articles from the defendant, while the court which has decreed the accounting cannot interfere in any manner to prevent the prosecution of the foreign suits, it may stay the accounting it has ordered, on the ground of inequitable conduct, unless the plaintiff elects to abandon the other suits.

But an application in the premises, to be entertained at all, should certainly be made before the plaintiff has concluded his proofs for hearing on the merits.

MR. *William M. Evarts*, for the plaintiffs.

MR. *Charles F. Blake*, *contra.*

BLATCHFORD, J. In this case, on the 20th of March, 1873, after final hearing on pleadings and proofs, a decree was made, adjudging the first three claims of the reissued letters patent, granted to the plaintiffs June 9, 1868, on which the suit was brought, to be void, and the fourth claim thereof to be valid, and decreeing that the defendants had infringed said fourth claim, and should account to the plaintiffs for the profits in consequence of said infringement, and should be perpetually enjoined from infringing said fourth claim.

The said reissued letters patent were granted for an "improvement in pulverulent acid for use in the preparation of soda powders, farinaceous food, and for other purposes." The four claims of the patent are as follows: —

"1. As a new manufacture, the above described pulverulent acid.

"2. The manufacture of the above described pulverulent phosphoric acid, so that it may be applied in the manner and for the purposes above described.

"3. The mixing, in the preparation of farinaceous food, with flour, of a powder or powders, such as described, consisting of ingredients of which phosphoric acid, or acid phosphates and alkaline carbonates are the active agents, for the purpose of liberating carbonic acid, as described, when subjected to moisture or heat, or both.

"4. The use of phosphoric acid or acid phosphates, when employed with alkaline carbonates, as a substitute for ferment or leaven, in the preparation of farinaceous food."

The accounting ordered was entered upon, and in the course of it the defendant, George V. Hecker, was called as a witness on the part of the plaintiffs, before the master, and showed that when this suit was commenced the defendants were making and selling self-raising flour, in preparing which they used an acid called the Lauer acid; that before the said decree was made they discontinued the use of the Lauer acid; that after they so discontinued using the Lauer acid, they used at times, in the preparation of self-raising flour, as a substitute for the Lauer acid, a substance which they made and which was manufactured from bone-black, muriatic acid, and sulphuric acid, and at other times a substance purchased by them; that they used both down to the time he was testifying, in November, 1873; and that during the same time they used other acids, of which the principal one was tartaric acid. He was then asked by the plaintiff to cause to be prepared from the books of the defendants a statement, showing from the time they began to use the Lauer acid, which was in April or May, 1868, the amount of self-raising flour sold by the defendants, made by the use of the Lauer acid; and the amounts of such flour sold by them made by the use of acids which they manufactured; and the amounts of such flour sold by them made by the use of acids which they purchased. The defendants objected to the giving of this information, on the ground that the accounting could only extend to the use of the flour in making bread by any of the defendants. The master ruled that the statement must be prepared, but the witness declined to prepare it until the defendants could apply to the court for instructions in the premises. Such application has not been brought to a hearing.

The only acid passed upon on the question of infringement, before the decree was made, was the Lauer acid. None of the acids used after the use of the Lauer acid was discontinued have as yet been passed upon in this suit, or by this court, on the question of infringement. The proceedings on such accounting have proceeded no further, and have not been concluded.

In September, 1873, the plaintiff brought a suit in equity in the circuit court for the district of New Jersey, on the same patent, against the said George V. Hecker alone. The bill in that suit sets out the bringing of this suit; that it was brought before the passage of the patent act of July 8, 1870, and that the bill in it did not pray for a recovery or assessment of the damages sustained by the plaintiff by the infringement of the patent by the defendants.

The bill in that suit then prays that the damages sustained by the plaintiff, by the infringement of the patent by George V. Hecker since the granting of the patent, may be assessed and adjudged to the plaintiffs.

It then set out the making of the decree in this suit, and avers that

since said decree was made, George V. Hecker has discontinued making, using, and selling the acid which was made, used, and sold by him at the time of the filing of the bill in this suit, and which was so made, used, and sold by him prior to the entry of the said decree in this suit, and that he has substituted and uses a new, other, and different pulverulent acid from that used by him at the commencement of this suit and during its progress, and that such new acid is not embraced within said decree, and has not been adjudged by the court to be an infringement of the plaintiffs' rights, under said patent, and is not properly subject to be accounted for in the accounting ordered by said decree, but forms the subject of a new, distinct, and independent suit. It then avers that since the 20th of March, 1873 (the date of the decree in this suit), George V. Hecker has infringed the patent by making, using, and selling pulverulent acid, in infringement of the claims of the patent, and prays that he may account for and pay over to the plaintiffs the damages they have sustained by his unlawful acts prior to the 20th of March, 1873, and also the damages they have sustained by his wrongful acts since the 20th of March, 1873, and also his gains and profits by reason of such unlawful manufacture, use, and sale since March 20, 1873, of such pulverulent acid, made in accordance with the claims of the patent. The answer of George V. Hecker, in the suit in New Jersey, admits that after the making of the said decree, he ceased to manufacture and use acid prepared in the manner in which the acid which was the subject of the bill in this suit was prepared, and that he has since made and used an acid, but states that he is ignorant, and cannot answer whether said acid is substantially the same as, or an equivalent for, the acid which was the subject of this suit, and avers that it would require a scientific research to enable him to answer touching the nature and character of said acid.

This answer was sworn to on the 3d of December, 1873. The taking of proofs in the New Jersey suit was commenced on the 22d of January, 1874. It was continued by both parties during March, 1874, and has been concluded.

The plaintiffs have also brought a suit in equity on the same patent, since September, 1873, in the circuit court for the District of South Carolina, against Benjamin Feldman and Robert Teskey. The bill therein avers the making, using, and selling by them since the granting of the patent, of pulverulent acid in infringement thereof, at Charleston. The answer denies that the defendants have made, used, or sold any bread or any self-raising flour manufactured or prepared by them, and avers that all of the self-raising flour they have used or sold has been bought by them of the agents of John Hecker and George V. Hecker. The taking of proofs in the South Carolina suit was begun on the 17th of February, 1874, and was continued by both parties during March, 1874, and has been concluded.

A like suit in equity was brought by the plaintiffs in February, 1874, in the circuit court for the Southern District of Georgia, against Julius Knox. The bill therein avers the making, using, and selling by him, since the granting of the patent, of pulverulent acid in infringement thereof, at Savannah. That suit has been proceeded with no further.

The defendants in this suit now apply to the court therein for an injunc-

tion restraining the plaintiffs from further prosecuting said suits in New Jersey, South Carolina, and Georgia, and from commencing other suits against purchasers of self-raising flour from the defendants in this suit. The application is based on the facts that the self-raising flour sold by the defendants in the suits in South Carolina and Georgia was made by the defendants in this suit and sold by them to the defendants in the suits in South Carolina and Georgia; that the defendants in this suit have been called on to account in this suit for the making and selling of the self-raising flour sold by them to the defendants in the suits in South Carolina and Georgia, and for the making and selling of the self-raising flour covered by the New Jersey suit; and that the proofs of infringement relied on in the evidence in the suits in New Jersey and South Carolina are sales of self-raising flour in September, 1873, and November, 1873, respectively.

If this court were applied to by the defendants in this suit to stay the accounting, under the decree therein, on the ground that the plaintiffs had, by inequitable conduct, debarred themselves from the right to proceed with such accounting or to exclude certain matters from the accounting, the application would be recognized as one based on sound principles. The pursuit by the plaintiffs in another suit against George V. Hecker, of an accounting for the same thing sought to be accounted for against him in this suit, might be ground for excluding such things as respects him from the accounting in this suit, unless the plaintiffs should elect to abandon such pursuit on the other suit. But it is difficult to see upon what recognized or sound principle this court has any jurisdiction, or power, or rights on the bill filed in this suit, to assume to regulate the conduct of the plaintiffs by injunction, or stay, or repression, except as regards proceedings in this suit. The plaintiffs are a Rhode Island corporation. They have come into this court by bill and submitted themselves to its jurisdiction only so far as it may be necessary for this court to make orders, to regulate the proceedings in this suit, and decrees giving or withholding the relief sought by the bill in this suit. To grant the injunction asked for would be to turn the defendant into the plaintiff and the plaintiff into the defendant; and to administer affirmative relief in favor of a party without his coming into court as an actor, by bill or other pleading containing allegations capable of being put in issue by formal pleading or of being contested on proofs, and to do so in matters arising *post litem motam*.

Independently of these considerations it may be remarked that the New Jersey suit, on the allegations of the bill in it sustained by those of the answer in it, is one which might very properly have been brought even in this court.

Moreover, the application to be entertained at all in respect to the New Jersey and South Carolina suits should have been made before the plaintiffs had been put to the trouble and expense of taking their proofs for final hearing.

The application is denied.

CIRCUIT COURT OF THE UNITED STATES. — DISTRICT OF CALIFORNIA.

[AUGUST, 1874.]

PRESUMPTIONS OF LAW IN FAVOR OF THE ACTS OF COURTS OF GENERAL JURISDICTION. — THEIR EXTENT AND LIMITATIONS.

GALPIN v. *PAGE.*

1. *The courts of the United States, as has been often hitherto decided, are not bound by state constructions of common law questions.*
2. *The judgments of the courts of one state are not strictly either foreign or domestic judgments in another, not being the proper foundation of final process except in the state where rendered, and being open to inquiry as to the jurisdiction and notice to defendant in the courts of another state as well as in those of the United States.*
3. *There is no presumption in favor of the judgments of a court of general jurisdiction except as to matters and persons falling within the scope of that general jurisdiction.*
4. *There can be no personal judgment upon substituted service against a non-resident of a state, except as a means of reaching property situated at the time within the state, or affecting some interest therein, or determining the status of the plaintiff with respect to the non-resident party.*
5. *What constitutes a record of a court of general jurisdiction.*
6. *Classification and discussion of suits in rem; concerning the service of process upon infants of tender years, and matters governed by the facts of the case.*

FIELD, J. The material questions presented for consideration in this case have already been determined by the recent decision of the supreme court of the United States. It is unnecessary, therefore, to repeat at large the facts of the case; they are given in the report of the decision in 18th Wallace. It will be sufficient to state here its general features. The action is ejectment for the possession of certain real property situated within the city of San Francisco, both parties deraigning title from the same source, Franklin C. Gray, deceased, who died in the city of New York in July, 1853, intestate, seised of the premises in controversy. The plaintiff claims through conveyances executed by direction of the probate court of the city and county of San Francisco, which administered upon the estate of the deceased. The defendant claims under a purchaser at a commissioner's sale, had under a decree of a district court of the state, having jurisdiction in that city and county, rendered in a suit brought to settle the affairs of alleged copartnerships between the deceased and others. The case turns upon the validity of this decree and the commissioner's sale had under it.

The suit in which that decree was rendered was one into which two suits, brought by different parties, had been consolidated. One of them was brought in 1854, by William H. Gray, a brother of the deceased; the other was brought in 1855 by Cornelius J. Eaton, who had been at one time a clerk of the deceased. Each of these complainants alleged a

separate, distinct, and dormant copartnership between himself and the deceased, which embraced the commercial business in which the latter was engaged and all his real estate transactions. Gray alleged that his interest in the business and property of the copartnership formed between him and the deceased was one third. Eaton claimed that his interest in the business and property of the copartnership formed with him was one fourth. Each of these complainants, alleging an universal and dormant copartnership between himself and the deceased, denied, one of them under oath, any copartnership of the deceased with the other. Subsequently, however, they consented to a consolidation of their suits; and four days afterwards, a decree was entered, and it would seem from the certificate of the judge appended to the decree that it was by consent of the parties, adjudging that each had been a copartner with the deceased as alleged by him, and that both of these copartnerships, dormant and unknown to each other as they were, embraced all the property and all the business of the deceased.

By the decree a reference was ordered to a commissioner to take an account of the business, profits, and property of the two copartnerships, with directions, upon the confirmation of his report, to sell all the property, real and personal, of both copartnerships, and to execute proper conveyances to the purchasers. At the sale which subsequently took place, one of the attorneys of the complainant Gray became a purchaser of the premises in controversy. He afterwards conveyed an undivided half to his law partner, and devised the other undivided half to the defendant. His law partner some years later transferred his interest also to the defendant.

The deceased, Franklin C. Gray, left surviving him a widow, Matilda C. Gray, of whom a posthumous child was born in December following, named Franklina C. Gray. By the law of California the estate of the deceased vested in the widow and child in equal shares; and they both were made parties to the suits of Gray and Eaton; in the first suit the child being made a party by a supplemental bill. Both were non-residents of the State of California and residents of the State of New York, and their absence from this state and residence in New York were averred in the pleadings. Constructive service upon them, by publication under the statute, was therefore attempted. The widow appeared; and upon representation that service had been made upon the infant, a guardian *ad litem* was appointed for her, and he consented to the consolidation of the two suits and, it would seem, to the decree rendered.

Subsequently, upon appeal to the supreme court of the state, the decree of the district court in the consolidated suit was reversed, on the ground that no sufficient service of summons had been made upon the infant Franklina in the case brought by Eaton; and that, until such service, no guardian *ad litem* could be appointed for her; and on the additional ground that the evidence presented had not established a copartnership between William H. Gray and the deceased. The case was accordingly remanded to the district court; and subsequently the two suits, after being on the calendar for trial for nearly a year, were dismissed. The plaintiff acquired his interest and brought the present action after this dismissal.

When the case was originally here, the circuit court decided that the record in the suits of Gray and Eaton, in the district court, did not show that due service of summons by publication had not been made upon the infant Franklina, and as the district court was a superior court of general jurisdiction, it must be presumed to have had jurisdiction of the subject matter and of the parties in those suits; and that, in consequence, the sale and conveyance under the decree, notwithstanding its subsequent reversal on the grounds stated, passed a good title to the purchaser, — the court holding that where a record of a judgment of a superior court of general jurisdiction was assailed collaterally, it was not enough that the record did not affirmatively show jurisdiction, but that it must affirmatively show that the court did not have jurisdiction, or its judgment would be valid until reversed on appeal or vacated in some direct proceeding taken for that purpose. And so the court said, that "at the time of the sale a purchaser was entitled to rely upon the validity of the decree (in the consolidated suit), unless it affirmatively appeared on the face of the record that the court had no jurisdiction of the infant."

But the supreme court of the United States took a different view of the case, and held that the adjudication of the supreme court of the state, that no sufficient service of summons was ever made upon the infant Franklina, and that until such service no guardian *ad litem* could be appointed for her, was an adjudication that the jurisdiction of the district court over her had never attached, and that this adjudication was conclusive and binding upon the circuit court and every other court, when brought before it for consideration. Into its soundness the circuit court could not look; for it possessed no revisory power over the decisions of the supreme court of the state. The adjudication constituted the law of that case, and settled, for all possible controversies, the character of the decree of the district court. Rendered without jurisdiction, that decree was always void, so far as it affected the rights of the infant Franklina, and unavailing to support any proceedings under it affecting her title.

But the supreme court of the United States in its decision went still further, and held that the rule stated by the circuit court, as to the presumptions which the law implies in support of the judgments of superior courts of general jurisdiction, was subject to many exceptions and qualifications and had no application to the case at bar; that such presumptions were limited to jurisdiction over persons within the territorial limits of the courts, persons who could be reached by their process, and also over proceedings which were in accordance with the course of the common law. In these latter particulars, the decision was in affirmation of doctrines asserted by the circuit court in an elaborate and carefully considered opinion, delivered in 1865, in the case of *Gray* v. *Larrimore*, which grew out of the sale under the same decree of the district court which is now before us. The doctrines there asserted were followed in the subsequent case of *Gray* v. *Murphy*, and, until the decision of this case by the present circuit judge, were not regarded as open to contestation in the circuit court. In this case they were overruled by him upon the supposed obligation of the court to follow a decision of the supreme court of the state in *Hahn* v. *Kelly*, rendered in 1868. 34 Cal. 391. And to that case frequent reference has been made by counsel on the present trial, and some of its

positions have been pressed with great earnestness, as though they were decisive of the points now under consideration. That case was cited to the supreme court of the United States. Extracts from the opinion in the case constituted the principal argument before that court of one of the counsel of the defendants; and if its positions were not expressly mentioned in the opinion of that court, it was not because they had not been carefully considered.

That case was brought to quiet the title to a tract of land in Alameda County, and to restrain its sale. The plaintiff asserted title to the premises by virtue of a sale under a judgment recovered for the deficiency remaining of a mortgage debt, after application of the proceeds received upon a sale of the property mortgaged. The suit in which the mortgage was foreclosed and judgment for the deficiency rendered, was prosecuted without personal service upon the defendant, upon publication of summons; and the validity of the judgment was assailed upon the alleged ground that the attempted service of the summons by publication was defective and void. The decree, however, recited that it appeared to the court that the summons and complaint had been "duly served on the defendants according to law and the order of the judge of the court;" and the supreme court of the state held that this recital was a direct adjudication upon the point and was as conclusive upon the parties as any other fact decided, provided it did not affirmatively appear, from other portions of the record, that the recital was untrue. As there was no direct contradiction of the recital, and as no other objection than the one mentioned was taken, this ruling as to the effect of the recital disposed of the case, and necessitated a reversal of the decree below. The court, however, in its opinion, did not confine its consideration to this point, but proceeded to lay down certain general rules as to the presumptions of jurisdiction attendant upon the judgments of superior courts of general jurisdiction, and to declare what constitutes the record in this state of such judgments, and the conditions upon which they may be collaterally assailed. Among other things, it asserted in substance, and so far as anything in an opinion can be deemed an adjudication, which is not necessary to the decision, it adjudged: —

1st. That a judgment of a court of general jurisdiction could not be attacked collaterally, except for matters apparent upon its record; that it was not necessary that the jurisdiction of the court should affirmatively appear upon the record, but that, in the absence from the record of matters affirmatively disclosing a want of jurisdiction, either over the subject matter of the action or the person of the defendant, such jurisdiction would be conclusively presumed; and that this conclusive presumption prevailed in all cases without reference to the character of the proceedings, or the residence of the parties against whom they were taken.

2d. That in this state such record of the court consist only of the papers and proceedings which compose what is designated in the Code of Procedure as the judgment roll; and, where jurisdiction is exercised over persons without the territorial limits of the court, by constructive service upon them by publication of summons, and judgment by default is rendered upon such service, the record need not contain certain material proceedings, without which jurisdiction cannot attach, or any recital or evi-

dence of such proceedings, because the legislature has not directed such proceedings to be incorporated into the so-called judgment roll.

We do not regard the case at bar as one where any collateral attack is made upon a judgment of a superior court of general jurisdiction. The decree in the consolidated suit of Gray and Eaton is not here attacked collaterally in any proper meaning of that term. The adjudication of the appellate court in the same case upon the character of that decree is not offered by way of collateral attack; it is the exhibition of the result of a direct proceeding with reference to that decree had on appeal. When we speak of a collateral attack, we refer to the presentation of grounds of invalidity, other than those which have been established by the prosecution of a writ of error or an appeal or some other direct proceeding to vacate the judgment. We will nevertheless examine the positions advanced by the supreme court of the state in the case named.

Before proceeding, however, to this examination, it is proper to say a few words respecting the light in which the ruling of the state court in that case is to be regarded in this court, and the right of this court to look into the jurisdiction of a state court when its judgment is produced in evidence.

In the first place, the ruling of the state court in *Hahn* v. *Kelly*, except so far as it gives a construction to the statute of the state, is not binding upon this court. In all that relates to the presumptions which attend the acts of the superior courts and the circumstances under which they may be assailed, it stands like the ruling of any other court, entitled to respect and consideration for the learning and ability of its members, but possessing no obligatory force. "Where private rights," says the supreme court of the United States in *Chicago City* v. *Robbins*, 2 Black, 429, "are to be determined by the application of common law rules alone, this court (and the same is true of the circuit court), though entertaining for state tribunals the highest respect, does not feel bound by their decision." "It is undoubtedly true in general," says the same court in another case (*Olcott* v. *Supervisors*, 16 Wall. 687), "that this court does follow the decisions of the highest courts of the states, respecting local questions peculiar to themselves, or respecting the construction of their own constitutions and laws. But it must be kept in mind, that it is only decisions upon local questions, those which are peculiar to the several states, or adjudications upon the meaning of the constitution or statutes of a state, which the federal courts adopt, as rules for their own judgments." The ruling of the state court in *Hahn* v. *Kelly*, except so far as it gives a construction to the state statute, relates to matters of general law, and not to questions of a local character peculiar only to the state. If the ruling of the court be correct, it applies not merely to judgments of the superior courts of general jurisdiction existing in California, but to the judgments of such courts existing in all other states.

In the second place, whilst the courts of the United States are not foreign courts in their relation to the state courts, they are courts of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them. And it is well settled, that neither the constitutional requirement, pro-

viding that "full faith and credit shall be given to the public acts, records, and judicial proceedings of every other state," nor the act of Congress providing for the mode of authenticating such acts, records, and proceedings (May 26, 1790), and declaring that when thus authenticated, they shall have such "faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from which the records are or shall be taken," precludes an inquiry into the jurisdiction of the court in which the judgment was given, or the right of the state to exercise authority over the parties, or the subject matter of the judgment. As was said in *Christmas* v. *Russell*, 5 Wall. 305, the judgments of the courts of one state are not foreign judgments in another state under the Constitution and act of Congress, nor are they domestic judgments in every sense; because they are not the proper foundation of final process, except in the state where they were rendered; and they are open to inquiry as to the jurisdiction of the court and notice to the defendant.

The act of Congress goes, perhaps, further than the constitutional requirement, which relates to the faith and credit to be given *in* each state to the public acts, records, and judicial proceedings of every other state, inasmuch as it declares the effect of the records and judicial proceedings of the states when authenticated, as provided "*in every court within the United States*," thus making its provisions applicable to the federal courts as well as to the courts of the states. The power of Congress to prescribe the manner in which the records of the states shall be proved in the national courts, and the effect which shall be given to them, is independent of the constitutional provision. Still the law is to have the same construction in its application to the national courts as to the state courts. It leaves untouched the general principle that the jurisdiction of every court is open to inquiry, when produced in the courts of another sovereignty.

The circuit court of the United States for the District of California has the same authority to examine into the jurisdiction of a state court of California, when its judgment is produced, as the circuit court of the United States for the District of New York has, when the same judgment is produced before that tribunal. All the circuit courts of the United States have the same relation to the state courts; and each will take notice of and administer in proper case the laws of the states. This court, for example, will take notice of, and, in a proper case, administer the law of New York, just as it will take notice of and administer the law of this state. In all cases the jurisdiction of a state court may be inquired into, but the inquiry can proceed no further; the jurisdiction existing, the merits of the controversy involved are not open to examination.

We recur now to the rulings in *Hahn* v. *Kelly*. The first position, that when a judgment of a court of general jurisdiction is produced in evidence, it can only be collaterally attacked for matters apparent upon its record, and that, in the absence of such matters, the jurisdiction of the court must be conclusively presumed, is with certain qualifications and exceptions undoubtedly correct. These qualifications and exceptions arise where the proceedings or the parties against whom they are taken are without the ordinary jurisdiction of the court, and can only be brought

within it by pursuing special statutory provisions. As we had occasion to observe in a previous case, "All courts, even such as are designated courts of superior or general authority, are more or less limited in their jurisdiction; they are limited to a particular kind of cases, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as may arise upon the high seas; or to the use of particular process in the enforcement of their judgments." *Norton* v. *Meader*. When we speak of a court of general jurisdiction in civil cases, we do not mean one which has jurisdiction over all subjects and all persons and of all process; but we mean one which exercises a general jurisdiction, in law or equity, according to the well established principles known to those departments of jurisprudence over subjects and persons, within certain defined territorial limits. When a judgment of such a court is produced, relating to a matter falling within the general scope of its powers, the jurisdiction of the court will be presumed, even in the absence of the formal proceedings or steps by which the jurisdiction was obtained; and such jurisdiction cannot ordinarily be assailed except on writ of error or appeal, or by some other direct proceeding. But when the judgment of such a court relates to a matter not falling within the general scope of its powers, and the authority of the court over the subject can only be exercised in a prescribed manner, not according to the course of the common law; or the judgment is against a party without the territorial limits of the court, who was not served within those limits and did not appear to the action, no such presumption of jurisdiction can arise. The judgment being, as to its subject matter or persons, out of its ordinary jurisdiction, authority for its rendition must appear upon the face of its record. In other words, there is no presumption in favor of the judgments of courts of general jurisdiction, except as to matters and persons falling within the scope of that general jurisdiction. When the proceeding is special and outside of that general scope, either as to subjects or persons, the presumption ceases, and the record must show a compliance with the special authority, by which the extraordinary jurisdiction is exercised. This doctrine is an obvious deduction from principle, and is sustained by adjudged cases almost without number in the highest courts of the several states, and in the supreme court of the United States. There is running all through the reports the emphatic declaration of the common law courts, that a special authority, conferred even upon a court of general jurisdiction, which is exercised in a mode different from the course of the common law, must be strictly pursued, and the record must disclose the jurisdiction of the court. On this subject the cases speak a uniform language, with scarcely a dissentient voice.

The tribunals of one state have no jurisdiction, and can have none, over persons or property without its territorial limits. Their authority is necessarily circumscribed by the limits of the sovereignty creating them. Any exertion of authority beyond those limits would be deemed, as stated in *D'Arcy* v. *Ketchum*, 11 How. 174, in every other forum an illegitimate assumption of power, and be resisted as mere abuse.

But over property and persons within those limits the authority of the state is supreme, except as restrained by the federal Constitution. When, therefore, property thus situated is held by parties resident without the

state, or absent from it, and thus beyond the reach of the process of its courts, the admitted jurisdiction of the state over the property would be defeated, if a substituted service upon the parties were not permitted. Accordingly, under special circumstances, upon the presentation of particular proofs, substituted service, in lieu of personal service, is allowed by statute in nearly all the states, so as to subject the property of a non-resident or absent party to such disposition by their tribunals as may be necessary to protect the rights of their own citizens. In this state, the statute, in terms, allows a constructive or substituted service in all cases, whether upon contract or for torts, where the person on whom the service is to be made is a non-resident of the state or is absent from it, whether the action be directed against property within the state, or merely for the recovery of a personal judgment against the defendant. But so far as the statute authorizes, upon such substituted service, a personal judgment against a non-resident except as a means of reaching property situated at the time within the state, or affecting some interest therein, or determining the status of the plaintiff with respect to such non-resident, it cannot be sustained as a legitimate exercise of legislative power. A pure personal judgment, not used as a means of reaching property at the time in the state or affecting some interest therein, or determining the status of the plaintiff, rendered against a non-resident of the state, not having been personally served within its limits and not appearing to the action, would not be a judicial determination of the rights of the parties, but an arbitrary declaration by the tribunals of the state as to the liability of a party over whose person and property they had no control. The validity of the statute can only be sustained by restricting its application to cases where, in connection with the process against the person, property in the state is brought under the control of the court and subjected to its judgment, or where the judgment is sought simply as a means of reaching such property or affecting some interest therein, or to cases where the action relates to the personal status of the plaintiff in the state.

Aliens at peace with the United States are allowed access to the courts of the states, and unless the statute be limited in its application as stated, we must accept the conclusion that personal judgments for torts by one alien against another, neither of whom has ever been within our borders, may be recovered without personal service, by publication, and subsequently enforced against any property belonging to the defendant, that may by chance be brought into the country. It would certainly be a strange application of the statute if an inhabitant of Asia could recover in that way in our courts a personal judgment for an alleged tort committed against him in his own country by one of his countrymen.

An attachment of the property of a non-resident is allowed by the law of this state in all actions upon contracts, express or implied. This remedy, with the ordinary power of a court of equity to enforce mortgages and other liens, and to take property into its custody where there is danger of its removal beyond the state, or of being wasted, and the information imparted to third parties by filing a notice of *lis pendens* where an interest in real property is the subject of the litigation, affords sufficient protection to citizens of the state without the assumption of any territorial jurisdiction over non-residents. Be this as it may, any such assumption can find no support in any principle of natural justice or constitutional law.

"Where a party is within a territory," says Mr. Justice Story in *Picquet* v. *Swan*, 5 Mason, 43, "he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if on account of his supposed or actual property being within the territory, process by the local laws may by attachment go to compel his appearance, and for his default to appear, judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*, for the plain reason that, except so far as the property is concerned, it is a judgment *coram non judice*. . . . . The principles of the common law (which are never to be lost sight of in the construction of our own statutes) proceed yet further. In general, it may be said, that they authorize no judgment against a party, until after his appearance in court. He may be taken on a *capias* and brought into court, or distrained by attachment and other process against his property to compel his appearance, and for non-appearance be outlawed. But still, even though a subject, and within the kingdom, the judgment against him can take place only after such appearance. So anxious was the common law to guard the rights of private persons from judgments obtained without notice and regular personal appearance in court."

"Jurisdiction is acquired," says the supreme court in *Boswell's Lessee* v. *Otis*, 9 Howard, 348, "in one of two modes: first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by attachment or a bill in chancery. It must be substantially a proceeding *in rem*."

A substituted service is usually made in the form of a notice published in the public journals, as in this state. "But such notice," says Cooley (p. 404), in his treatise on Constitutional Limitations, "is restricted in its legal effect, and cannot be made available for all purposes. It will enable the court to give effect to the proceeding so far as it is one *in rem*, but when the *res* is disposed of the authority of the court ceases. The statute may give it effect so far as the subject matter of the proceeding is within the limits, and therefore under the control, of the state; but the notice cannot be made to stand in the place of process, so as to subject the defendant to a valid judgment against him personally. In attachment proceedings, the published notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual. The defendant could not be followed into another state or country, and there have recovery against him upon the judgment as an established demand. The fact that process was not personally served is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings. Where a party has property in a state, and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, due process of law would require appearance or

personal service before the defendant could be personally bound by any judgment rendered."

In *Cooper* v. *Reynolds*, 10 Wall. 308, similar doctrines are laid down by the supreme court of the United States. In that case, the plaintiff had sued the defendants in Tennessee for false imprisonment, and upon affidavit that none of them were to be found in his county, sued out a writ of attachment against their property. Publication was ordered by the court, notifying them to appear and plead, answer or demur, or that the suit would be taken as confessed, and proceeded in *ex parte* as to them. Publication was had, and the defendants having made default, judgment was entered against them, and the attached property was sold under it. The purchaser having been put into possession, the original owner brought ejectment for the premises. In considering the character of the attachment suit, the court, speaking through Mr. Justice Miller, said: "Its essential purpose or nature is to establish, by the judgment of the court, a demand against the defendant, and to subject his property, lying within the territorial jurisdiction of the court, to the payment of that demand.

"But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within that territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case, whether he appears or not.

"If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.

"That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well established propositions: first, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."

The writer of the present opinion thought some of the objections taken to the preliminary proceedings in the attachment suit referred to were well founded, and dissented from the judgment of the court; but in the

doctrine laid down in the above citation he always has concurred. It is, in our judgment, the true doctrine, and the only doctrine which is consistent with any just protection to the citizens of other states. Such is the constant intercourse between citizens of different states at the present time that the greatest insecurity to property would exist, if purely personal judgments obtained *ex parte*, without personal citation, upon mere publication of notice, which, in the great majority of cases, would never be seen by the parties interested, could be made available for the seizure of property afterwards brought within the state. That law would be intolerable, if valid, which would permit citizens of another state to come into this state and recover personal judgments for all sorts of torts and contracts, upon mere service by publication against citizens of different states who have never been within the state or possessed any property therein. If such judgments could be upheld, they would become the frequent instruments of fraud in the hands of the unscrupulous, and be sprung on the property of the unsuspecting defendants when the transactions giving rise to the judgments have passed from their memory, or the evidence respecting the transactions has perished. We do not think it within the competency of the legislature to invest its tribunals with authority having any such reach and force; certainly no presumption in favor of their jurisdiction can arise when a judgment of this character is produced against a non-resident who has never been within the state, and did not appear to the action. Hare & Wallace's Notes to Smith's Leading Cases, vol. 1, p. 838; *Picquet* v. *Swan*, 5 Mason, 535; *Monroe* v. *Douglass*, 4 Sand. Ch. 182.

The second position laid down in *Hahn* v. *Kelly* requires us to consider what papers and proceedings constitute the record of a court of general jurisdiction, which may be looked into when a judgment of that court rendered against a person without the territorial limits of the court, upon constructive service by publication, is assailed collaterally for want of jurisdiction. In that case it is held, that such record consists only of the papers and proceedings which compose what is designated in the Code of Procedure as the judgment roll; and that it need not contain the affidavit of the party and the order of the court, without which constructive service of the summons by publication cannot be made.

The statute authorizing constructive service by publication of summons upon non-resident and absent parties requires certain facts to be presented by affidavit to the court in which the action is pending, or to a judge thereof, or to a county judge. If it appear upon such presentation to the satisfaction of the court or judge that the facts exist, an order may be made for the publication of the summons, and such order must prescribe the period and designate the paper in which the publication is to be made; and if the residence of the defendant be known, the order must also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to him at his place of residence. The service of the summons is deemed complete at the expiration of the time prescribed by the order for publication.

The statute, in the same title which treats of the manner of commencing civil actions, after stating the manner in which service shall be made in case of personal service and in case of service by publication, provides in

sections almost immediately following that "Proof of the service of summons shall be as follows: 1. If served by the sheriff, his certificate thereof; 2. If served by any other person, his affidavit thereof; 3. In case of publication, the affidavit of the printer or his foreman or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons in the post-office, if the same has been deposited."

In another part of the same statute, in a different title and chapter, treating of a different subject, "the manner of giving and entering judgment," it is provided that immediately after entering the judgment, in case the complaint be not answered, the clerk shall attach together the summons with the affidavit or proof of service, and the complaint with a memorandum indorsed thereon, that the default of the defendant in not answering was entered, and a copy of the judgment; and that these papers shall constitute the judgment roll in the case.

Now, it is evident that the language of the statute in the first title mentioned, declaring what shall be proof of service of the summons, must be limited to the action of the persons making the service or publication, of which the sections immediately preceding in the same title speak; as if the language were as follows: "Proof of the service of summons by the sheriff or other person, or by a publisher of a newspaper, as above provided, shall be as follows." The obvious meaning intended is, that the proof of service, which the parties performing the particular duty prescribed must furnish, shall be the certificate or affidavit designated. It does not mean that such certificate or affidavit shall be all that is required on the subject of service, but only all that is required of those particular persons. Any other construction would lead to this absurd result, that an affidavit could be used to establish conclusively a fact to which it makes no reference. Publication of a summons in a newspaper is not service of the summons, nor is an affidavit of such publication proof of service. The publication, to be of any avail, must be in a paper designated and for the period prescribed by the order of the court or judge. The terms of such order must, therefore, be connected with the affidavit, or the proof will amount to nothing. The affidavit by itself is only a portion of the proof, a solitary link in the chain required. The printer is not supposed to know anything of the order, and is not called upon even to refer to it in his affidavit.

When, therefore, the record of the judgment comes to be made up, it must necessarily include the order of the court, or it will disclose no proof of service. And when the statute requires the clerk to attach with other papers the proof of service, it means not merely the affidavit which the publisher may furnish as part of such proof, but the order also, without which the affidavit establishes nothing. It is in giving to the provision, declaring the proof which the officer or person making personal service or the printer publishing the summons shall furnish of their acts, the effect of a declaration that no other proof of the service was necessary, that error in our judgment was committed in *Hahn* v. *Kelly*.

That the ruling in that case left the judgment roll a defective and imperfect record seems to have been felt by the court, for it says: "In our judgment, it would have added to the completeness of the record to have made the proof of service by publication include, also, the affidavit of the

party, and the order of the court directing publication to be made, for, in point of law, they constitute a part of the mode; but the legislature has not seen proper to do so, and we can no more add to their will than we can take from it."

For the reasons we have stated, we do not admit that the statute sanctions any such defective record; but, on the contrary, we are clear that, properly construed, it requires full proof of the jurisdictional facts to be incorporated into the judgment roll.

If, however, we are mistaken, and the order, which is the foundation of and the only authority for the publication, is no part of such roll, or, if not mistaken, we are bound to accept as correct the construction of the statute given by the state court, then inquiry into the jurisdiction of the court cannot be limited, on a collateral attack, to the contents of the roll. The remaining record of the proceedings would be of equal authority and verity, and could be equally relied upon. The record at common law, which imported absolute verity, was a history of all the acts and proceedings in the action, from its initiation to final judgment, enrolled upon parchment for a perpetual memorial and testimony. These rolls were called records of the court, and were, in the language of Blackstone, "of such high and supereminent authority, that their truth was not to be called in question." A record, professedly embracing only a portion of such acts and proceedings cannot be entitled to similar implicit credit, and cannot equally close the door against collateral attack. The use of the same designation to indicate a different collection of acts and proceedings cannot, of course, carry with it the same import. If the legislature should declare that only that portion of the proceedings in an action which constitutes the judgment itself should be enrolled, it would not be any less illogical to insist that to that enrolment parties should be confined when questioning the jurisdiction of the court, than it is that they shall be confined to any other defective record of the proceedings in the action.

When constructive service by publication in a personal action is authorized by statute in place of personal citation, the rule prevailing in all courts is, that the statute must be strictly pursued. We are not aware that this doctrine has been denied in any state court. It has been repeatedly asserted by the supreme court of this state in the most emphatic manner. "A contrary course," said that court in *Jordan* v. *Giblin*, in 1859, "would encourage fraud and lead to oppression." 12 Cal. 100. "A failure to carry out the rule thus prescribed," said the court, speaking through Mr. Justice Sanderson, in *Ricketson* v. *Richardson*, 26 Cal. 149, "in any particular, is fatal where it is not cured by an appearance." In *Forbes* v. *Hyde*, 31 Cal. 342, decided in 1866, the same doctrine is recognized. There the objection to the insufficiency of an affidavit made to obtain an order of publication was allowed on a collateral attack to the judgment under which the plaintiff claimed title in ejectment. As the statute only requires certain facts to appear by affidavit *to the satisfaction of the court or judge*, we should be inclined, in the absence of this decision, to hold that defects in the affidavit could be taken advantage of only on appeal, and could not be urged collaterally. We cite the case, however, not only because it reiterates the rule of strict construction, but because of

the special reason it gives for its enforcement in this state, in the observation that there is, probably, "no state in which so many have waited and are still waiting for their adversaries to depart, in order that suit may be brought and judgment obtained against them on publication without actual notice." "It may be important," continues Mr. Justice Sawyer, in delivering the unanimous opinion of the court, "to the interests of those who suppose they have acquired rights under this class of judgments, that they should be upheld. But it is equally important that the interests of parties, who have only been constructively served with process, and who, in many instances, have had no actual notice till they have been condemned unheard, should be protected. If a judgment is void for want of jurisdiction, all those who have acquired interests under it have done so in full view of the condition of the record; while, on the other hand, a defendant is liable to have an unjust judgment rendered against him without any knowledge of the pendency of the action till it is too late to protect himself. An appeal is no adequate remedy where a party has no notice; for the time to appeal is very brief, and may expire before actual notice is obtained. In the language of the court in *Smith* v. *Rice*, 11 Mass. 512, "the very grievance complained of is, that the party had no notice of the pending of the cause, and of course no opportunity to appeal."

Now, if the rule in *Hahn* v. *Kelly* be correct, we have this singular result: that whilst the statute must be strictly followed before jurisdiction can be acquired over the person, a party against whom a judgment is rendered is precluded from examining the proceedings, by which alone it can be seen whether the statute has been followed. In other words, the court says no jurisdiction is acquired by the court if the requirements of the statute be not pursued, but the record of the proceedings taken shall always be a closed book.

If the order of the court is no part of the judgment roll it cannot be brought before the court on appeal, unless a statement or bill of exceptions be made up; and either of these proceedings supposes the presence of the parties or counsel. If any other direct proceedings are taken they might result in vacating the judgment; but under the ruling in the case cited, the record being regular on its face, the purchaser, if a third party, would be protected, and the wronged defendant be left to the doubtful chances of recovering the value of his property by action against the plaintiff.

From the examination we have thus been able to give to the case of *Hahn* v. *Kelly*, we do not find in it sufficient reasons to depart from the old and well established rules formerly recognized in the supreme court of the state, the observance of which, as we are more and more impressed every day, is essential to the protection of the rights of all citizens, whether resident or non-resident of the state.

The proceedings for constructive service by publication which the statute authorizes are as stated by Mr. Justice Sanderson in the case of *Ricketson* v. *Richardson*, *supra*, "in derogation of the common law;" that is, they are not in accordance with the course of the common law.

It was the boast of that law that it condemned no one in his person or his property without his day in court. That there must be citation before hearing, and hearing, or opportunity of being heard, before judgment,

was a cardinal principle which pervaded all its judicial proceedings. And when the articles of compact contained in the Ordinance of 1787, for the government of the Northwest Territory, declared that its inhabitants should always be entitled "to judicial proceedings according to the course of the common law," it was believed by them that they had in that guarantee the assurance of full protection to all their private rights; and that the language was not used "mainly for ornamental purposes," having a certain "rotundity of sound which is pleasing to the ear," but leaving "no definite impression upon the understanding." *Hahn* v. *Kelly*, *supra*. The common law recognized no such proceeding as a personal judgment without the appearance of the party, and probably in no other case than *Hahn* v. *Kelly* were proceedings to outlawry ever cited as a mode "amounting or equivalent to constructive service," by which a common law court obtained jurisdiction. "By the strict rules of the common law," says the supreme court of New Jersey in *Hess* v. *Cole*, 8 Zab. 116, "it was necessary in every suit, not only that the defendant should be served with process, but that his appearance to the action should be effected. Every student is familiar with the cumbrous machinery and complicated process by which the courts sought to compel the *appearance* of the defendant. He is familiar also with the principle, that if the defendant was contumacious and refused to appear to a mere civil action, the proceedings were at an end. No judgment could be rendered. Every common law record shows upon its face that the defendant was either in custody, or was summoned or attached to answer to the action. And, however inconvenient may have been the strictness with which the principle was applied, and the extent to which it was enforced in ancient common law proceedings, the principle itself is by no means peculiar to the common law. It pervades, in fact, every code of law and every well regulated system for the administration of justice."

The opinion in *Hahn* v. *Kelly* is not only singular in its reference to proceedings to outlawry for want of appearance of a party; but the citations from Blackstone, to show that the courts of chancery would proceed to judgment upon a constructive service of process at all analogous to service by publication, establish nothing of the kind; and only seem to do so because they are detached from their context in the volume. They relate to proceedings to compel the appearance of parties *after service of the subpœna*, which is the original process in chancery, as any one will see who will read the whole page in Blackstone from which the citations are taken.

Service of the subpœna could indeed be made by leaving a copy at the actual residence of the defendant, as well as by delivering a copy to him personally. And in special cases where an absent or absconding defendant had appointed a person to act as his agent in the matter litigated, substituted service upon such agent in lieu of the principal was, upon application to the court, sometimes allowed. Adams Equity, 324; *Hobhouse* v. *Courtney*, 12 Simons, 130. But it was not until the statute of 5th George 2, c. 25, that proceedings could be taken by publication, without service in one of the modes indicated. That statute authorized proceedings by proclamation published in the London Gazette, and read in the parish church, and posted in the Royal Exchange, where a defendant had absconded to avoid service. It did not apply to a citizen or subject of another government who had never been in the realm.

Passing from *Hahn* v. *Kelly*, we proceed to consider the other positions taken by the defendant to defeat a recovery. It is contended by her counsel: 1st. That the cases of Gray and Eaton were suits *in rem*, and that the decree in the consolidated suit bound the property without reference to the defective service of summons upon the infant; 2d. That the district court had authority to appoint a guardian *ad litem* for the infant without previous service upon her; and 3d. That the decree in the consolidated suit was not reversed as to the widow Matilda.

1st. Suits *in rem* may be divided into four classes: 1st. Those which are directed primarily against particular property, and are intended to dispose of it without reference to the title of individual claimants; 2d. Those which are instituted to determine the status of particular property or persons; 3d. Those which are, in form, personal suits, but which seek to subject property brought by existing lien or by attachment, or some collateral proceeding, under the control of the court, so as to give effect to the rights of the parties; and 4th. Those which seek to dispose of property, or relate to some interest therein, but which touch the property or interest only through the judgment recovered. Proceedings in admiralty for the forfeiture of a vessel or goods are instances of the first kind; the suit is there brought against the vessel or goods directly, without reference to the rights of persons, and all parties are notified to appear by a designated day and assert their claims or the property will be condemned. Proceedings in the probate court upon the validity of a will are instances of the second kind; the judgment, when rendered, operating directly upon the status or condition of the instrument, determining its validity or invalidity. Proceedings by attachment against the property of debtors, or to foreclose a mortgage, or other lien upon property, or to partition real estate, are instances of the third kind. Proceedings to compel the execution or cancellation of a conveyance of real property in the state, and proceedings to wind up and dispose of partnership property, are instances of the fourth kind. The third and fourth classes mentioned are not strictly proceedings *in rem*; but so far as they affect property in the state, they are treated as substantially such proceedings.

In proceedings *in rem* notice of some kind is required, but as all property is supposed to be in the possession of its owner, either in person or by agent, a seizure of property is, of itself, considered to impart notice of the proceeding to the owner. Therefore, where the property is, at the outset, taken into the custody of the court, the law is less strict in requiring further notice, either generally by proclamation to all persons, or specially to the reputed owner. But where the property to be affected is not thus at the outset taken into custody, there is no constructive notice given by the proceeding; and the same notice, as provided by law, must be given to the defendant, as in actions where a personal judgment for damages is alone sought. "A proceeding," says the supreme court of Vermont, in *Woodruff* v. *Taylor*, 20 Vermont, 65, where the law on the subject of suits *in rem* is stated with great clearness, "professing to determine the right of property where no notice actual or constructive is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It will be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court."

The suits of Gray and Eaton were partly *in personam*, and were, at the same time, intended to subject property in the state to the disposition of the court; but as the property was not taken into custody at the outset, there was no constructive notice given to the owners or claimants by the proceeding, and the absent and non-resident defendants could only be brought before the court by publication of summons, as provided by statute, and this, as the supreme court held, was never done, so far as the infant Franklina was concerned.

2d. As to the authority of the district court to appoint a guardian *ad litem* for the infant without previous service upon her, it is sufficient to observe that the supreme court of the state, on appeal, decided that no such authority existed. The statute requires service of summons on all infants before a guardian *ad litem* can be appointed, and makes no difference in this respect between an infant of a few months, and one nearly attaining his majority, and the service can no more be dispensed with in the one case than in the other. Besides, there is wisdom in the provision requiring service even upon an infant in its cradle, for the papers, through its nurse or relatives, would almost be sure in such case to find their way into the hands of parties who would look after the interests of the child. Be this as it may, it is the proceeding required by the legislature before the jurisdiction of the court can attach; and as Chief Justice Taney said of a mere formal objection which was insisted upon in the supreme court, nothing is unimportant or to be disregarded which the legislature has prescribed as a condition for exercising the jurisdiction of the court. Where personal service cannot be made by reason of the non-residence in the state or absence of the infant, service must be made by publication as in other cases. Such publication is the prescribed condition to the exercise of jurisdiction over the infant.

3d. The objection, that the decree of the district court in the consolidated action was not reversed as to the widow Matilda is not founded upon fact. There was but one decree, though the court speaks in its opinion as though there were two separate decrees before it. This is an evident inadvertence in the language of the court, arising from the fact that the objections to the validity of the decree were taken to the separate proceedings had before their consolidation. The case was remanded for further proceedings; and on filing the *remittitur*, the question evidently arose as to what proceedings should be had, and after hearing counsel for the parties, the court ordered a new trial on all the issues as to all the parties. Upon this order the case remained on the calendar of the district court for trial for over a year, and was then dismissed. The order of dismissal was entered in the consolidated suit, and it would appear, for greater caution, in the separate suits also.

The decree as to the infant Franklina being void for want of jurisdiction in the district court over her, all proceedings founded upon such decree, so far as her rights are concerned, necessarily partake of the same infirmity. The purchaser of the premises being one of the attorneys of the plaintiff Gray, the law, as held by the supreme court, imputes to him knowledge of the defects in the proceedings which were taken under his direction and that of his partners. The conveyance of the undivided half to his law partner was made after the reversal of the decree, and the latter

also took his interest with similar knowledge of the defect. Independently of this fact, their title fell with the reversal of the decree. On this subject we can add nothing to what was said in the opinion of the supreme court, except that the doctrine of *Reynolds* v. *Harris* was reaffirmed in the late case of *Reynolds* v. *Hosmer*, reported in 45 California, 617.

As to the claim for rents, we are of opinion that the cost of filling up the water lot, which was a valuable and permanent improvement, is a just offset to the rents received or which might have been received by the defendant.

It follows from the views we have expressed that the plaintiff is entitled to judgment for the possession of the premises; and such judgment will be entered upon the findings filed — with costs.

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BANK.

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FENCE.

Where it is stipulated in a deed-poll that the grantee, his heirs and assigns, shall build and perpetually maintain a fence on the line between the land granted and other lands owned by the grantor, and the parties to such deed, at the time of its execution, contemplate the subdivision of the granted premises into building or town lots, and their subsequent sale, the burden of maintaining such fence will not attach to, or run with, lots which do not abut on the line of the proposed fence. *Walsh* v. *Barton*, 341.

FISHING, RIGHT OF.

The right of fishing in a river is subordinate to that of navigation, but this does not excuse the master of a vessel from running into and damaging a net of a fisherman, where he could change the course of the vessel without prejudice to the reasonable prosecution of his voyage, and thus avoid the net. *Cobb* v. *Bennett*, 172.

FRAUDS, STATUTE OF.

Where the name of the agent with whom a contract for the purchase of real estate was made appears in the written memorandum of the agreement signed by the purchaser, who is the party to be charged, the statute of frauds is satisfied, although the names of the principals are not disclosed therein. *Walsh* v. *Barton*, 341.

GUARDIAN AND WARD.

1. A man of wealth and having no family dependent on him, under guardianship as insane, should be allowed those luxuries which he desires and can enjoy, which are unobjectionable in themselves and would be proper and reasonable expenditures for a sane man in a similar position. *May* v. *May*, 123.
2. A guardian of an insane man whose estate was worth over $200,000 spent four hours three times a week in visiting and dining with his ward, and superintending the management of his house and grounds; and the ward's spirits and condition were much improved by the visits. *Held*, that a monthly charge of $100 for personal services, besides the commission of five per cent. on the income collected, should be allowed to the guardian; but that an additional charge of $100 for attending court should be disallowed, as should also a charge of $200 for attending the ward on two journeys of a fortnight each, which were undertaken partly on account of the guardian's own business. *Ib.*
3. The additional compensation, if any, allowed to a guardian for changing investments of his ward's property, or making repairs thereon, should not be by way of commissions on the amount invested or expended. *Ib.*
4. A guardian who makes up his accounts monthly may charge his ward's estate each month with his commissions on the amount collected in that month, and with a month's interest on a balance from the preceding month in his own favor, and may carry the balance to the next month. *Ib.*

HABEAS CORPUS.

The supreme court of the United States has authority to issue a writ of *habeas corpus*, accompanied by a writ of *certiorari*, to bring before it the proceedings of a circuit court for the purpose of ascertaining whether such court has exceeded its powers. And in a criminal case it may release the prisoner. *In re Lange*, 256.

HOMESTEAD EXEMPTION.

1. Where a party waived his right of homestead exemption in a negotiable promissory note, and was subsequently adjudged a bankrupt, it was held that the homestead was not exempt as against the holder of the note. *In re Solomon*, 351.
2. A statute which permits the head of a family to waive an exemption of homestead is not an infraction of a constitutional provision by which such exemption is created. *Ib.*

HUSBAND AND WIFE.

See MARRIED WOMAN.

INJUNCTION.

INSURANCE.

See CONSTRUCTION OF STATUTES, 1.

INSURANCE (FIRE).

INSURANCE (LIFE).

INTEREST.

JUDGMENT.

JUDGMENT NOTE.

A judgment note made more than four months prior to an adjudication of bankruptcy upon which an execution is issued within four months, is not necessarily fraudulent. *Sleek* v. *Turner's Assignee*, 485.

JUDICIAL SALE.

In proceedings by attachment against M., judgment is rendered against him, and there is an order for a sale, and a sale and conveyance to the purchasers of the real estate attached. *Held* : —

1. The judgment and conveyance made under the judgment and order, by the sheriff, divested M. of his legal title to the property, unless the said sale was fraudulently made, and the confirmation thereof was procured by fraud, and that the purchaser was privy to such fraud, or had notice of the same, or of such circumstances as would put a prudent *bonâ fide* purchaser upon inquiry in respect thereto. *Underwood* v. *McVeigh*, 281.
2. But if the purchaser combined with others to purchase the property at the attachment sale, at a sacrifice ; and if in pursuance of such combination they so acted as to prevent competition at said sale, or to prevent the said property realizing a fair value, then such combination and action was fraudulent and the deed of the sheriff passes no title to the purchaser. *Ib.*

See REBELLION, THE.

JURISDICTION.

1. The courts of the United States may take jurisdiction of causes affecting the property of a state in the hands of its agents without making the state a party when the property or agent is within the jurisdiction. *Swasey* v. *N. C. R. R. Co.* 359.
2. The company in this case holds the share of its property represented by the stock subscribed by the state, in trust, as well for the bondholders as for the state. The charter made the company the depository of the pledge to hold it for both parties. Consequently a suit which seeks to charge the stock as security, and brings the corporation in to represent it, may be maintained, in the absence of the state as a party. *Ib.*
3. It appearing to the court that the stock had been deposited with the company to secure the payment of interest in which default had been made, a sale of the stock was directed to be made unless the state should provide by taxation for the amount due within a reasonable time. *Ib.*
4. The act of March 30, 1871, of Virginia, Sess. Acts, 1870–71, p. 332, does not give justices of the peace jurisdiction to try a case of felony ; and the conviction and punishment of a party by a justice for an assault and battery will not bar a prosecution for wounding with intent to kill, by the same act for which he was punished by the justice. *Murphy* v. *The Commonwealth*, 486.
5. Presumptions of law in favor of the acts of courts of general jurisdiction, their extent and limitations, defined and expounded. *Galpin* v. *Page*, 534.

See DIVORCE ; HABEAS CORPUS ; JUDGMENT, 1; PATENT, 7.

LANDLORD AND TENANT.

1. Where a lessee is, by his lessor, wrongfully evicted from a portion of the demised premises, he is thereby excused from the payment of any of the rent, although he remains in possession of the remaining portion of the premises to the end of the term. *Hayner* v. *Smith*, 508.
2. But to constitute an eviction, there must be more than a mere trespass by the landlord. There must be something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the premises — the question of eviction or no eviction depending upon the circumstances, and being a matter for the jury to decide. *Ib.*
3. Some acts of interference by the landlord with the tenant's enjoyment of the premises may be mere acts of trespass, or may amount to an eviction, the question whether they partake of the latter character depending upon the intention with which they are done; if clearly indicating an intention on the landlord's part that the tenant should no longer continue to hold the premises, they would constitute an eviction. *Ib.*

LIVERY-STABLE KEEPER.

See BAILOR AND BAILEE.

MALICIOUS PROSECUTION.

1. In order for the plaintiff to recover in an action for malicious prosecution, the burden of proof is upon him to show clearly, by a preponderance of evidence, that the defendant did not have probable cause to institute the criminal prosecution against him. Good faith on the part of the prosecutor is always a good defence, unless it appear that he closed his eyes to facts around him which would have been sufficient to convince a reasonably cautious man that no crime in fact had been committed by the person about to be prosecuted. *Palmer* v. *Richardson*, 163.
2. The fact that the defendant, before instituting a prosecution alleged to be malicious and without probable cause, had honestly laid all the facts before counsel and followed his advice, is pregnant evidence to show the existence of probable cause. *Ib.*

MANDAMUS.

Mandamus is the appropriate remedy to restore an attorney disbarred where the court below had exceeded its jurisdiction in the matter. *In re Robinson*, 326.

See MUNICIPAL CORPORATION; PLEADING AND PRACTICE, 4.

MARRIED WOMAN.

1. The deed of a married woman, to be operative as a valid conveyance, must be executed in strict conformity with all the statutory requirements. *Heaton* v. *Fryberger*, 307.
2. Where the name of a married woman is omitted in the body of a deed, equity cannot supply the omission, even if the execution and acknowledgment are legally sufficient. *Ib.*

See BANKRUPTCY, 1, 9; PLEADING AND PRACTICE, 8.

MASTER AND SERVANT.

1. One employed by a railroad corporation to drive a locomotive engine over its road may recover damages against the corporation for personal injuries caused by a defect in the engine, which was due to the neglect of the agents of the corporation charged with keeping the engine in proper repair, although the directors and superintendent had no reason to suspect negligence or incompetence on the part of such agents. *Ford* v. *Fitchburg R. R. Co.* 501.
2. One employed by a railroad corporation to drive a locomotive engine over its road is not debarred from recovering damages against the corporation for injuries from an explosion caused by a defect in the boiler of the engine, by the fact that he was acting in intentional violation of the rules of the company, unless the accident was due, in whole or in part, to such violation; nor by the fact that such rules provided that the driver of an engine should be held responsible for the condition of his engine, must be sure that it was in good working order, and must immediately stop, draw his fire, station his signal men, and procure assistance, whenever any defect was detected in an engine that would make it in his judgment unsafe to proceed; nor by the fact that he knew the engine was not in good working order, if he did not know and ought not to have known that it was unsafe. *Ib.*

See NEGLIGENCE, 1.

MORTGAGE.

A bill in equity, to declare the plaintiff entitled to redeem land, which the defendant holds by an absolute conveyance from him, may be maintained upon parol proof that he bought the land with money borrowed from the defendant, and, though he executed his absolute deed intelligently, yet both parties understood that it was intended as security for the loan. *Campbell* v. *Dearborn*, 107.

See RAILROAD, 6.

MUNICIPAL CORPORATION.

1. *Held:* that mandamus will not lie against a county to compel the levy of a tax to pay a judgment recovered upon ordinary county warrants where the power to levy a tax

NOTICE.

NUISANCE.

PARDON.

PATENT.

PHOTOGRAPHY.

See EVIDENCE, 6.

PLEADING AND PRACTICE.

See CRIMINAL LAW, 1, 3, 12; EVIDENCE, 2; JUDGMENT, 1; MANDAMUS; PATENT, 6; PRINCIPAL AND AGENT, 1, 2, 3, 4; REMOVAL OF CAUSES.

POWER OF ATTORNEY.

L. executed a power of attorney to H., authorizing him to collect his said judgments against C., by sales under execution, &c., to receive the money thereon, "arbitrate or compound" the same, and for that purpose to employ counsel. After the aforesaid sales, F. brought an action against L. to annul the said sales and conveyances to L., as clouds on his, F.'s title. H. consulted counsel, who advised him that the said sales under W.'s judgment after payment were void, and L.'s title invalid. *Held*, that as incident to the powers expressly given to collect said judgment, arbitrate and compound the same, in connection with subsequent instructions from L., by letter, H. had power to authorize counsel to appear in said action and consent to a judgment annulling said sales upon terms that enabled him to realize the amount due to L. on his judgment. *Lee* v. *Rogers*, 218.

PRESUMPTIONS.

See JURISDICTION, 5.

PRINCIPAL AND AGENT.

1. In order to constitute a valid defence within the rule in *George* v. *Clagett*, 7 T. R. 359, the plea should show that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods; that that person sold them as his own goods in his own name as principal, with the authority of the plaintiff; that the defendant dealt with him as, and believed him to be, the prineipal in the transaction; and that before the defendant was undeceived in that respect the set-off accrued. *Borries* v. *Imperial Ottoman Bank*, 181.
2. It is not necessary in such a plea, to negative "means of knowledge," that the seller was dealing as an agent. *Ib.*
3. To a count for goods sold and delivered, the defendants pleaded that the goods were sold and delivered to them by S., then being the agent of the plaintiffs, and intrusted by them with the possession of the goods as apparent owner thereof; that S. sold the goods in his own name and as his own goods, with the consent of the plaintiff; that, at the time of the sale, the defendants believed S. to be the owner of the goods, and did not know that the plaintiffs were the owners of or interested therein, or that S. was agent; and that, before the defendants knew that the plaintiffs were the owners of the goods, or that S. was agent in the sale thereof, S. became indebted to the defendants, &c., claiming a set-off. *Ib.*
4. Replication, that, before the sale by S., the defendants had the means of knowing that he was merely apparent owner of the goods, and that the same were intrusted to him as agent, and that S. was agent, and as such sold the goods to the defendants. *Held*, that the plea was good, and the replication no answer to it. *Ib.*
5. By the by-laws of a railroad company, its treasurer was made the custodian of the ledger and other books relating exclusively to the ownership and transfer of the capital stock of the company; he was required to prepare and countersign all certificates of ownership of stock and scrip that might be issued, and to receive and enter upon the proper books all transfers thereof. It was made his duty, also, to affix the seal of the company to all certificates of ownership of stock and scrip properly issued by the company, and signed by the president. Such treasurer, wishing to obtain money for his own use, fraudulently issued from the office of the company sundry certificates of stock, signed by himself, sealed with the corporate seal of the company, and having also the signature of the president, and purporting to be genuine in every respect. Upon the stock so issued, the treasurer, through the agency of a broker, borrowed large sums of money, the lender not knowing for whom the money was wanted, and advancing the same solely upon the faith of the certificates, which he believed to be genuine. Two of the certificates were issued directly to the lender, and the third was issued to the broker and by him assigned to the lender. Some months afterward it was discovered that there had been a fraudulent issue of stock to a large amount by the treasurer, who soon after the discovery absconded. The company thereupon gave notice requesting the stockholders of its genuine stock to present their certificates and receive in exchange new certificates. Upon presentation of the above certificates by the holder thereof, in pursuance of this notice, he was informed that they were spurious, and the treasurer of the company refused to exchange them for new certificates. On suit brought against the company, by the holder of these certificates, for its refusal to exchange them for new certificates, it was held, that the defendants were liable for the fraudulent acts of its agents; and the jury, in assessing the damages to which the

REBELLION, THE.

RECORD.

REMOVAL OF CAUSES.

RES ADJUDICATA.

See JUDGMENT, 5.

RIPARIAN RIGHTS.

If the water of a stream becomes polluted by the emptying into it of city sewers, so that a riparian proprietor cannot use it in his business as he has been before accustomed to do, he cannot recover against the city for the pollution, so far as it is attributable to the plan of sewerage adopted by the city; but he can recover for it so far as it is attributable to the improper construction or unreasonable use of the sewers, or to the negligence or other fault of the city in the care or management of them. *Merrifield* v. *City of Worcester*, 480.

SET-OFF.

See BANKRUPTCY, 5; BILLS AND NOTES, 3; PRINCIPAL AND AGENT, 1.

SEWER.

See RIPARIAN RIGHTS.

SPECIAL DEPOSIT

1. To render the directors of a bank liable for a special deposit wrongfully converted and used by the bank, it is only necessary to show that, but for their gross inattention, a knowledge of the conversion must have been brought to the notice of the directors. Actual knowledge is not necessary. *United Society of Shakers* v. *Underwood*, 16.
2. A special deposit is neither more nor less than a naked bailment. *Ib.*

See NEGLIGENCE, 3.

SPECIAL LAW.

See CONSTRUCTION OF STATUTES.

SPECIFIC PERFORMANCE.

A purchaser of land who is entitled under his contract to a perfect title cannot be compelled to perform his agreement, if the property purchased be subject to a judgment lien, unless he can be protected by the decree from loss by inconvenience by reason of the lien, although it be shown that the judgment debtor has other property sufficient to satisfy the judgment. *Walsh* v. *Barton*, 341.

See EVIDENCE, 2.

SUBSCRIPTION.

1. A material change in the charter of a railroad company will have the effect of releasing a subscription to its stock. But the change must be something that was not authorized at the time the subscription was made. *Nugent* v. *Supervisors of Putnam Co.* 376.
2. A subscription was made by a county to a railroad which was consolidated with another railroad, the charter of the company to which the subscription was made permitting the consolidation. It was *held* that the subscription was not released by the consolidation. *Ib.*

SUNDAY.

See INJUNCTION, 3.

TAXATION.

1. The city council of Richmond may lay a tax upon lawyers as such. *Ould* v. *City of Richmond*, 241.
2. The ordinance of the council provides that lawyers and others shall be divided into six classes, and that those in each class shall pay a certain sum as his tax; and it directs that the committee of finance shall place each lawyer in the class to which they

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CASES REPORTED.

ABBREVIATIONS USED IN THE DIGEST OF CASES CONTAINED IN CONTEMPORARY PERIODICALS, WITH ADDRESSES OF PUBLISHERS.

Albany L. J....*Albany Law Journal*, Albany, N. Y., WEED, PARSONS & Co.
Am. Law Rec....*American Law Record*, Cincinnati, O., H. M. MOOS.
Am. Law Reg....*American Law Register*, Philadelphia, Pa., D. B. CANFIELD & Co.
B. R....*Bankruptcy Register*, New York, J. R. MCDIVITT.
Cent. L. J....*Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.

Chicago L. N. ..... *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.

Daily Reg ..... *Daily Register*, New York, 303 BROADWAY, N. Y.

Ins. L. J ..... *Insurance Law Journal*, New York, C. C. HINE, 176 BROADWAY.

Int. Rev. Rec ..... *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.

Leg. Chron ..... *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.

Leg. Gazette ..... *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.

Leg. Int ..... *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.

Mo. West. Jur ..... *Monthly Western Jurist*, Bloomington, Ill., THOMAS F. TIPTON.

Pac. Law Rep ..... *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.

Pittsb. L. J ..... *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.

West. Jur ..... *Western Jurist*, Des Moines, Iowa, MILLS & CO.

THE AMERICAN LAW TIMES.

NEW SERIES. — JANUARY, 1874. — VOL. I., NO. 1.

OUR readers will peruse with interest the carefully prepared opinion of Mr. Justice MILLER, delivered in the case of *Wilson* v. *City Bank of St. Paul*, which is published in the present issue of our reports. The effect of this decision is to overthrow the precedents of perhaps a majority of the inferior courts upon a point that has received not a little attention at the hands of some of the ablest of the federal judiciary. The opinion is thus epitomized by its learned author: —

1. That something more than passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due and he is without just defence to the action, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the bankrupt act.
2. That the fact that the debtor under such circumstances does not file a petition in bankruptcy is not sufficient evidence of such preference, or of intent to defeat the operation of the act.
3. That, though the judgment creditor in such case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the bankrupt law.
4. That the lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition.

The attention of our readers is particularly directed to the Digest of Cases from contemporary legal periodicals which will be found in the present number of the Law Times. We shall hereafter publish a similar collection each month, and hope that it will prove to be of value and utility.

The Digest will embrace the substance of all the cases of general interest that have appeared *in extenso* in our legal exchanges up to within a few days of our "going to press," and will be arranged in convenient form to facilitate ready reference. With such a collection before him the attorney will be able to keep himself fully advised of all the adjudications that are to be found in the whole range of the current legal periodical literature of America, and will be enabled to understand the characteristics of each publication. He will thus be able to procure such cases as may be of moment to him a few weeks after their appearance in print. He will have, in short, a key to the character and contents of every American law journal in which cases are published in full.

The collection which appears in our present issue is a fair illustration of the new feature. The same plan will be pursued in future issues, and every effort will be made to make the compilation as exhaustive and accurate as possible. It is not proposed to burden our pages with decisions that involve the construction of state statutes, or which are of local consequence only, but to select such as are of common interest to the bar of

every section. Further than this there will be no elimination of the contents of the divers publications.

We are sanguine that our readers will derive not a little practical benefit from so comprehensive and novel a collection.

DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ADMINISTRATOR'S ACCOUNT.

PRESUMPTION OF SETTLEMENT. — After twenty years it is the presumption that an administrator's account is duly settled, and the burden of proof is on the complainant to overthrow the presumption. *In re Bentley*, Legal Chronicle, January 3, 1874.

ADMIRALTY.

RULE AS TO ADVANCES IN FOREIGN PORT EXPOUNDED. — In June, 1865, the American steamer Emily B. Souder, owned by residents in New York, whilst on a voyage to that port from Rio Janerio lost her propelling screw, and put into the port of Maranham, on the coast of Brazil, in distress. She was towed into that port by another steamer for which she had signalled. The captain was without adequate funds to make the repairs required and furnish the vessel with the supplies necessary to enable her to proceed on her voyage, or to pay the expenses of her towage into port, and of pilotage, custom-house dues, fees of the consul in the port, and expenses of medical attendance upon the sailors. Both he and the owners of the vessel were unknown in Maranham, and without credit there. Under these circumstances the captain borrowed of the libellants the necessary funds to enable him to pay these several expenses, and gave them drafts on the owners of the vessel in New York for the amount, payable thirty days after sight, which drafts were accepted on presentation, but were protested for non-payment:

Held, 1st, that the items of expense for towage, pilotage, custom-house dues, consular fees, and medical attendance upon the sailors stood in the same rank with the repairs and supplies to the vessel, and that the libellants advancing funds for their payment were equally entitled as security to a lien upon the vessel; 2d, that the drafts were only conditional payment, and did not discharge and satisfy the original debt.

After the libellants in one of the cases had agreed with the captain to advance all the funds required by him, the libellant in the other case, who had been first applied to by the captain, agreed to advance a portion of the funds, and did so:

Held, that this subsequent agreement did not affect the implied hypothecation of the vessel for the whole, the advances by both libellants having been made on the credit of the vessel, and not solely on the personal credit of the captain or owners.

The presumption of law is, in the absence of fraud or collusion, that where advances are made to a captain in a foreign port, upon his request,

to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or for pilotage, towage, and like services rendered to the vessel, that they are made upon the credit of the vessel as well as upon that of her owners. It is not necessary to the existence of the hypothecation that there should be in terms any express pledge of the vessel, or any stipulation that the credit shall be given on her account.

The presumption in such cases can be repelled only by clear and satisfactory proof that the master was in possession of funds applicable to the expenses, or of a credit of his own, or of the owners of the vessel, upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry.

Liens for advances of funds for the necessities of vessels in a foreign port have priority over existing mortgages to creditors at home.

Where advances in a foreign port are made in gold, and drafts for the amount on the owners show that the payment to the parties making the advances is to be also in gold, the court may direct that its decrees be entered for the amount in like currency. *The Steamship Souder*, Chicago L. N., January 10, 1874.

2. LIBEL BY INSURER. — In case of a total loss of a cargo by collision, a libel may be brought by the insurer against the colliding vessel, after notice and proof of the loss and demand of payment, though without actual payment. *The Manistee*, Ib.

3. WHEN WILL LIE, THOUGH LOSS NOT ACTUALLY PAID. — The insured having been fully satisfied for the loss, and not intervening or opposing the prosecution of the libel of the insurer, the carrier cannot be permitted to raise the objection of non-payment of the loss before libel brought. *Ib.*

4. POLICY ISSUED IN DISREGARD OF STATUTORY REQUIREMENTS. — Where the statutes of a state require foreign insurance companies to comply with certain requirements, and declare penalties for doing business in disregard of these requirements, in case of a loss on a policy issued in disregard of such requirements, a carrier cannot be permitted to make this a defence to a libel, the loss having been paid by the company. *Ib.*

ATTORNEY.

DEBARRING. — Gross misconduct on the part of an attorney acting in his official capacity, is a sufficient cause for striking him from the roll, although the person whom he injures be not a client. Good faith, more than skill or intellect, is essential to the profession of the law. *In re Orwig*, Legal Chronicle, January 24, 1874; *S. C.*, Legal Int., January 16, 1874.

ATTORNEYS' FEES.

See BANKRUPTCY, 7.

BANKRUPTCY.

1. ACCOMMODATION PAPER is not *per se* commercial paper, in the sense of the bankrupt act, as regards the accommodation maker. *In re Clemens*, 9 B. R. No. 2.

2. CHECK. — COUNTERSIGNING a check by the register is a judicial and not a ministerial duty. *In re Clark*, Ib.

3. CREDITORS. — OBJECTION TO ACCOUNT OF ASSIGNEE. — Creditors are not bound to object to an assignee's accounts except at a meeting called pursuant to section twenty-eight of the act. *In re Clark*, Ib.

FORECLOSURE OF MORTGAGE. — A creditor may proceed *in rem* to foreclose a valid lien notwithstanding the discharge of the debtor as a bankrupt. *Stoddard* v. *Locke*, Ib.

4. DISCHARGE. — CANNOT BE IMPEACHED IN STATE COURT. — A discharge in bankruptcy cannot be impeached in a state court for any cause that might have been urged in the courts granting it as a reason for its refusal. *Alston* v. *Robinett*, Ib.

5. FRAUDULENT TRANSFER. — NOTICE. — An assignee in bankruptcy can recover property transferred in fraud of the bankrupt act by the debtor, though in the hands of a subsequent purchaser with notice only that a legal advantage had been taken. *Harrell* v. *Beall*, Ib.

6. HOMESTEAD EXEMPTION. — ACT OF MARCH 3, 1873. — Amendatory act of March 3d, 1873, held constitutional as to all cases where petition in bankruptcy is filed after the passage of the act.

Where, prior to filing a petition in bankruptcy, the debtor has disposed of a homestead exempted to him under the state laws, and which, if in his possession, would be protected under the act of March 3d, 1873, against liens of prior judgments, he cannot invoke the protection of the bankrupt act in favor of his vendee. *In re Everitt*, Ib.

7. PRACTICE.—VERIFICATION OF ANSWER. — In courts where answers are verified in common law actions, the answer to involuntary petitions in bankruptcy must also be verified. *In re Findley*, Ib.

MARSHAL. — VOUCHERS. — STORE-KEEPER. — ATTORNEYS' FEES. — Marshals must present vouchers for the items charged in their accounts, or produce satisfactory reasons for the absence of vouchers.

A marshal can only be allowed a charge for a store-keeper, not to exceed two dollars and a half per day, on showing the necessity for his employment, the reasonableness of the price paid, and the actual payment to the store-keeper.

Petitioning creditors are not allowed, out of the fund, retainer paid their attorneys, or for any services rendered by their attorney after adjudication of the debtor bankrupt. *In re Comstock*, Ib.

8. REVALUATION. — POLICY OF INSURANCE. — Where the value of a security held by a creditor has been once agreed upon between the assignee and the creditor, and after such agreement new facts are developed, showing the valuation to have been erroneous, prior to the final dividend the assignee may require the security to be revalued.

In this case the present value of a policy of life insurance held by a creditor was assessed according to insurance tables as to probable duration of life, but before final dividend the bankrupt died, and on application of assignee the value of the security was re-assessed on the basis of the value of the policy at the time of the first assessment in view of the certainty of the death of the debtor at the time he died. *In re Newland*, Ib.

9. STATE INSOLVENT LAWS. — HOW FAR SUSPENDED BY ACT. — The passage of the bankrupt law suspends the state insolvent laws in force at

the time of its passage in so far as the provisions of the bankrupt law cover the subject matter of the state laws. *In re Reynolds*, Ib.

10. TRUST DEED. — ACT OF UNAUTHORIZED OFFICER OF CORPORATION. — RATIFICATION. — When an officer of a corporation, without authority, executed a deed of trust of its property as security for a negotiable instrument more than four months prior to commencement of proceedings in bankruptcy, and his act is afterwards ratified by the corporation, but within the four months prior to commencement of the proceedings, the validity of the deed must be determined by the circumstances existing at the time of the ratification, and not by those of the time of the original execution. *In re Kansas City S. & M. Manuf. Co.* Ib.

SEE CORPORATION, 2.

BOND.

NATURE OF DEFINED. — Railroad bonds payable to bearer, though not technically negotiable paper, are practically so for all purposes of commerce. They pass by delivery, and may be sued by the holder in his own name. The burden of proof, therefore, is upon the party who alleges that they were not received in the ordinary course of trade, and for a valuable consideration. *Rice* v. *So. Penna. &c. Co.*, Legal Int., January 2, 1874; *S. C.*, Legal Gazette, January 2, 1874.

See COLLATERAL SECURITY.

CO-EXECUTORS.

ONE CO-EXECUTOR cannot release a debtor, for a deposit made in the names of both executors. *Williams* v. *De Haven*, Legal Int., January 16, 1874.

COLLATERAL SECURITY.

WHERE BONDS ARE PLEDGED as collateral, the holders have a right to receive the full amount of the bonds, and not only the face of their claims with interest, unless subsequent creditors can show a resulting interest in their debtor. The holders must be left to account to their principal for any balance that may be over the amount due to themselves. *Rice* v. *So. Penna. &c. Co.*, Legal Int., January 2, 1874; *S. C.*, Legal Gazette, January 2, 1874.

CONSTITUTIONAL LAW.

1. BANKRUPTCY ACT OF MARCH 3, 1873, constitutional as to certain cases. See BANKRUPTCY 6.

2. TITLE OF BILL. See TITLE OF ACT.

3. POLICE POWER OF STATE will not authorize taking of private property for public uses without an adjudication. See TAKING PRIVATE PROPERTY.

See STATE TAXATION.

CORPORATION.

1. RATIFICATION OF ACT OF OFFICER. — An act of an officer of a corporation, afterwards ratified by the board of directors, becomes by such ratification the authorized act of the corporation. *Rice* v. *So. Penna. &c. Co.*, Legal Int., January 2, 1863; *S. C.*, Legal Gazette, January 2, 1873.

2. UNPAID SUBSCRIPTION. — BANKRUPTCY. — STOCKHOLDER. — SET-OFF. — TRUST. — Capital stock or shares — especially the unpaid subscription — constitute a trust fund for the benefit of the general creditors of a corporation.

This trust cannot be defeated by a simulated payment of the stock subscription, nor by any device short of an actual payment in good faith.

An arrangement by which the stock is nominally paid, and the money immediately taken back as a loan to the stockholder, is a device to change the debt from a stock debt to a loan, and is not a valid payment as against creditors of the corporation, though it may be good as between the company and the stockholder.

Sec. 20 of the bankrupt act was not intended to enlarge the doctrine of set-off beyond what the principles of legal or equitable set-off previously authorized.

A stockholder indebted to an insolvent corporation for unpaid shares cannot set off against this trust fund for creditors a debt due him by the corporation. The fund arising for such unpaid shares must be equally divided among all the creditors.

The relations of a stockholder to the corporation, and to the public who deal with the latter, are such as to require good faith and fair dealing in every transaction between him and the corporation, of which he is part owner and controller, which may injuriously affect the rights of creditors or of the general public, and a rigid scrutiny will be made into all transactions in the interest of creditors. *Sawyer* v. *Hoag*, Chicago L. N., January 17, 1874.

See BANKRUPTCY 10; INJUNCTION.

DISTRESS FOR RENT.

Where a tenant, in the course of his business, is necessarily put in the possession of the property of those with whom he deals, such property, although on the demised premises, is not liable to distress for rent due from the tenant.

Where a tenant has possession of materials in a boat yard, in his own right, though the materials are to be used in the construction of a boat for another person, such materials can be distrained upon. *Karns* v. *McKinney*, Legal Gazette, January 9, 1874; *S. C.*, Pittsburg L. J., January 14, 1874.

EQUITY JURISDICTION.

See TITLE.

ESTOPPEL.

See HUSBAND AND WIFE.

EVIDENCE.

1. PAROL TO EXPLAIN WRITING. — Parol evidence may be given of what passed between the parties at and immediately before the execution of a writing, where the party was induced to execute the writing by the parol promise proposed to be given in evidence. *Torrens* v. *Campbell*, Legal Gazette, January 9, 1874.

2. ONE OF DEFENDANTS HAD ENDEAVORED to negotiate certain promissory notes for the benefit of an unincorporated oil company, and failed in doing so. He then negotiated notes of his own, and retained the notes of his partners as collateral security for the payment of his own. It was alleged that he had agreed to return the notes upon failure to negotiate them. Testimony offered on the trial below, to show that the defendants had ratified and acquiesced in his holding the notes, was rejected. *Held*, to be error. *Ib.*

FIREWORKS.

See INSURANCE, 3.

FLEEING FROM JUSTICE.

ACT OF 1790. — A "fleeing from justice," within the act of Congress limiting criminal prosecutions, is to leave one's home, residence, or known place of abode, within the district, or to conceal one's self therein, with intent, in either case, to avoid detection or punishment for some public offence against the United States. *U. S.* v. *O'Brien*, Pittsburg L. J., January 14, 1874.

HUSBAND AND WIFE.

1. ESTOPPEL. — Plaintiff after obtaining judgment against the husband is estopped from bringing another action for the same cause against the husband and his wife. *Butcher* v. *South*, Legal Int., January 2, 1874; *S. C.*, Legal Gazette, January 2, 1874.

2. A CREDITOR WHO DENIES IN HIS ANSWER a married woman's titleto real estate, and alleges that the property belongs to her husband, will not be enjoined from levying on it and selling it as the husband's property. Under such circumstances a court of equity will not investigate the title, but leave the parties to contest it at law. *Dyer* v. *People's Bank*, Legal Chronicle, January 31, 1874.

See POSSESSION.

INJUNCTION.

ELECTION OF DIRECTORS. — An injunction will not be continued against a corporation merely because a dispute has arisen as to the election of directors who have not yet even taken their seats. *Paynter* v. *Clegg*, Legal Chronicle, January 3, 1874.

INSURANCE.

1. ALIENATION. — SALE OF INSURED PROPERTY. — NOTICE GIVEN BY VENDEE SUFFICIENT. — In 1857 G. B. Forney took a policy of insurance on his house for $3,000; in 1858 this was voluntarily reduced to

$2,000 by a memorandum on the face of the policy. G. B. Forney died October, 1869. On January 8th, 1870, the house was sold under order of the orphans' court to Hiram G. Dissinger, which sale was confirmed in the March court following. On January 17th, 1870, Dissinger sold his interest in the property to Henry G. Graybill. On February 7th, 1870, the house was destroyed by fire, and Graybill as owner gave notice to the fire insurance company. The charter of the company provided that when any property was sold or aliened, the policy should be void, and should be surrendered to be cancelled, unless notice be given to the secretary within thirty days of the sale. *Held*, that by the sale of the premises insured under the proceedings of the orphans' court, there was no such alienation before confirmation as avoided the policy, and the loss having occurred between the sale and the confirmation, the legal title was then in the hands of Forney, and the action on the policy was rightly brought in the name of the administrator to the use of the vendee. *Held*, that the vendee had sufficient interest to entitle him to give notice to the company. His personal representative, succeeding to his legal right as covenanted, is a trustee for the heirs or the vendee, and either the trustee or *cestui que trust* sufficiently represents the party for that purpose. *Farmers' Mut. Ins. Co.* v. *Forney*, Ins. L. J., November, 1873.

2. DESCRIPTION. — LIABILITY OF AGENT. — FALSE STATEMENT. — The appellant issued a policy to the insured upon his house, described as a brick building. At the time of the insurance, on account of the settling of the foundations, a portion of one of the walls had been removed and replaced by a temporary wooden substitute. One of the conditions of the contract — not a warranty — was that any misstatement in the description of the property should vitiate the policy. It was claimed that the court erred in refusing to instruct that the change was material, and in leaving it to the jury to find whether the condition of the building resulting from the change was material. *Held*, that the description was inserted not by way of warranty, but to identify the premises. *Held*, that if the plaintiff told Harvey, the agent, of the wooden studding in the wall, and if that amounted to telling him that it was a wooden building, Harvey should have so described it in the policy. The company was responsible for his omissions, and cannot avoid liability by reason of any discrepancy between any facts as disclosed to him, and his statement of them in the papers. It cannot saddle the blunder of its own agents on the plaintiff, and thus take advantage of its own wrong. *Held*, that in order to make a forfeiture under the subdivision relating to the value of the property insured, the false statement must be wilfully made with respect to a material matter, and with purpose to deceive the insurer. *Gerhauser* v. *No. British and Mer. Ins. Co.* Ib.

3. FIREWORKS. — FIRE-CRACKERS AND FIREWORKS. — HAZARDOUS ARTICLES. — The store and stock of fancy goods, toys, &c., of a German jobber and importer was insured against fire, and special provision to keep fire-crackers for sale was written in the policy. The keeping of other goods of a hazardous or extra-hazardous nature forfeited the policy. The respondent kept fireworks for sale, and the fire was caused by their accidental ignition. *Held*, that the fact that fire-crackers were specially provided for in the policy affords a very strong presumption against the

keeping of fireworks unless included in the written words, "in the line of the business." *Held*, that if any hazardous or extra-hazardous article enters into and forms a part of the line of business of the insured, then such article is specially provided for in the policy. *Held*, that the insurers are bound to know the nature and kind of articles belonging to the business of the risks they insure, and a specification of the business is sufficient for all the articles belonging to it, even though some of the articles are hazardous or extra-hazardous. *Steinbach* v. *Lafayette F. Ins. Co.* Ib.

4. LOSS. — PAYMENT OF THREE FOURTHS OF VALUE OF PROPERTY. — The company intended to adopt the principle that every member insured should stand his own insurer to the extent of one fourth of any loss which should occur. The by-laws prohibited more than three fourths of the actual cash value of any building being insured, but in case of a partial loss the insured might claim the whole amount, provided it did not exceed the sum insured. To remedy this the directors passed a resolution that only three fourths of any actual loss should be paid. *Held*, that in the agreement that "in case any loss should occur to our respective properties by fire, we will only claim and receive three fourths of the amount of the actual loss, provided three fourths of the amount as aforesaid does not amount to more than three fourths of the sum insured," the insertion of the proviso was unwarranted by the resolutions, and is not limited in case of a total loss to three fourths of the amount insured. The agreement was not to apply when three fourths of the actual loss should exceed three fourths of the sum insured, and in case of a total loss the insured is entitled to receive the whole amount of his insurance, which is three fourths of the actual cash value, and is not limited to three fourths of the amount of the policy. *Farmers' Mut. Ins. Co.* v. *Forney*, Ib.

5. MANUFACTURES. — PROCESS OF MANUFACTURE. — The respondents occupied a part of the premises for storage purposes under a lease, containing a provision against the use of the building for extra-hazardous purposes. A part of the premises were subsequently leased for the purpose of finishing chairs, for which various inflammable substances were used, and the fire was occasioned by the use of an alcohol lamp in this business. *Held*, that in the first class of hazards, no process of manufacture or completion of any article was contemplated, and that it had reference to articles in a finished state. *Held*, that there was an important difference between the risk of insuring against fire any article completed and finished and the same article undergoing the process of completion. *Appleby* v. *Astor Fire Ins. Co.* Ib.

6. PREMIUM. — PAYMENT OF. — CONSTRUCTION OF POLICY. — AVERMENT OF WARRANTY. — AGENT AND RENEWAL RECEIPT. — A life insurance policy provided that premiums should be paid annually on the 5th day of March. A notice indorsed on the policy and made part of the contract, after stating that the premiums were always due on the days stipulated in the policy, added, "except that thirty days' grace are allowed as within provided," followed by this paragraph: "No premium will be received by the company continuing any risk after the day named in the policy for the payment of such premium, unless the insured is in perfect health, and the risk continued at the entire option of the company, and no payment of premium is binding on the company unless the same is ac-

knowledged by a printed receipt signed by the president or secretary or actuary of the company. Agents are not authorized to bind the company by the issue of policies or permits, or give receipts for renewal of premiums, neither are they authorized to waive forfeiture, or make, alter, or discharge contracts." The insured was agent of the company. On the 3d of April, 1871, he was taken sick and continued to grow worse until the 7th of April, when he died. On the 5th of April he handed his wife several packages, saying they were to be sent off by express the next morning. Among these was a package bearing date of April 3d, and containing $100 to pay the renewal premium upon his policy. This package was not sent to the general agent until the 10th of April, on which day it was received by him. *Held*, that "the conditions annexed to a personal contract, like a policy of insurance, must be performed according to the terms used, and the apparent interest of the parties, and are not satisfied by a performance *cy pres*." *Held*, also, that "every warranty in the policy is a condition precedent, and the assured must aver and prove performance of it." *Held*, also, that the liability of the company depended upon the death of the assured during the continuance of the risk. The policy expired on the 5th of March, 1871, and the risk could be extended beyond that time only at the option of the company. The days of grace terminated on the 4th of April. Had the assured died on the 3d of April, and the amount of premiums been tendered on that day, the company would not have been bound to have received it. *Held*, also, that the deceased could not, as agent of the company, have given a binding renewal receipt to a third person under his own hand, and much less could he have renewed his own policy by a payment to himself. *Donnald* v. *Piedmont & Arlington Life Ins. Co.* Ib.

7. PUBLIC ENEMY. — CONTRACT OF INSURANCE ABROGATED BY WAR. — The policy of life insurance was issued some years before the war, and the premiums paid to 1862, when the agency in the insurgent States ceased by reason of the war. A tender was afterward made in due time to the former agent of all sums due before the death of the insured, which was in that year. The tender was refused and the officers of the company had no knowledge of the tender until after the death of the insured. *Held*, that the contract of insurance was abrogated the moment that the insured and insurer became public enemies; that it was simply impossible to keep the policy in force without constant intercommunication between the lines, and that it would be an act of great injustice to the loyal members of the company to intrust the collection of premiums to a public enemy. *Held*, that in case of ordinary debts the obligation is full before the war, but on a policy of insurance a new value is created by the very acts of public enemies. *Held*, that a policy of insurance in force on the life or property of a public enemy is a present capital in his hands. *Tait* v. *New York Life Ins. Co.* Ib.

8. PAYMENT OF PREMIUM ON THE DAY AGREED A CONDITION PRECEDENT. — *Held*, that the payment of a premium on the day agreed is a condition precedent, and that the policy became void for the non-performance of these conditions. *Held*, also, that impossibility of performance, growing out of unanticipated exigencies, constitutes no exception to its operation. *Held*, that the incidents of the war, which rendered the pay-

ment of premiums difficult or impossible, did not constitute an *excuse* for which subsequent tender authorizes a recovery. *Held*, also, that there is a difference between protecting a defendant from an action for damages, and authorizing him to recover against another, where in like circumstances he has failed to perform a condition precedent on which his right of action depended, and that this distinction is increased where the condition is optional and the damages are dependent upon some act to be performed at the election of the plaintiff, as the payment of premiums on a life policy. *Held*, also, that no degree of hardship will satisfy the rule that the act of God rendering the performance impossible is a defence; and in no case is impossibility an excuse if it refer solely to the personal disability of the promisor, there being no natural impossibility in the thing. *Ib.*

9. REPRESENTATION. — REPRESENTATIONS AND WARRANTY. — MATERIAL TO RISK. — *Held*, that the contracting parties can decide for themselves, and beforehand, what facts and representations shall be deemed material. This they may do by converting the representations into a warranty, or they can agree as to its materiality without putting it on the same footing as a warranty. *Held*, that a warranty, like a covenant, fixing and liquidating the quantum of damages, will not be created nor extended by construction or implication. For like reasons the intention of the parties as to the materiality of the answer or representation should be clearly manifested, and in case of doubt is to be resolved in favor of the insured. *Held*, that in actions on policies of insurance a recovery may be presented by proof of verbal representations, which, though undesigned, are material to the risk. *Gerhauser* v. *No. British & Mer. Ins. Co.* Ib.

10. STOCKHOLDER'S NOTE. — TREASURER. — SET-OFF. — BANKRUPTCY. — The company became insolvent on account of losses at the great Chicago fire, and was afterward put in bankruptcy by its creditors. The plaintiff was one of the original subscribers to the capital stock of the company. A part only of the amount subscribed had been paid, and for the remainder he had given his promissory notes, which were unpaid at the time of the decree in bankruptcy. The plaintiff was also at the time of the fire the treasurer of the company, and had a large amount of the company's funds in his hands, which he claimed to have borrowed of the company. He had also sustained losses to a large amount by the same fire, for which the company was liable under policies it had issued, and claimed that the amount due under the policies should be set off against the amounts due the company. *Held*, that "if the debt due from the plaintiff were an ordinary debt, then, the set-off would be allowed, although the result would be to pay the plaintiff his claim against the company in preference to other creditors." *Held*, also, that "the plaintiff has not the right in equity to set off his losses on the policies against his liabilities for the payment of the stock of the company. The obligation of every person who subscribes and owes for stock in such a company as this is, in case of its insolvency, to pay what he owes for the benefit of the creditors." *Held*, also, that whatever may have been the view of the plaintiff, the directors and the company did not regard the plaintiff as the mere borrower of the funds in his hands; and before a set-off would be admissible as between the company and its treasurer, in case of the insolvency or bankruptcy of the former, there ought to be satisfactory evidence that he, as to the

money, had taken the position of an outside party; in other words, that he had, as to the money, ceased to be the treasurer of the company. *Scammon* v. *Kimball*, Ib. Affirmed on appeal, Chicago L. N., January 17, 1874.

See ADMIRALTY 2, 3, 4; BANKRUPTCY, 8.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MARSHAL.

See BANKRUPTCY, 7.

MASTER AND SERVANT.

WHAT RISKS ASSUMED BY SERVANT ENGAGED IN DANGEROUS EMPLOYMENT. — B., who was a carpenter, was employed by R. to go in a boat, upon a submerged lot owned by him; and do certain work of his trade. While there at work, a shot was fired from a house on an adjacent lot, which wounded B., hence his action for damages. It appeared that R. knew his possession of the lot was resisted and a resort to arms was imminent at any moment. He did not inform B. of this fact, and the latter had no reason to believe he was going into danger when employed to do the work.

Held, R. was liable. The risk B. legally agreed to take was such as was necessarily incident to his employment.

R. could have relieved himself of responsibility by informing B. of the facts of the danger.

The concealment of facts, or the failure to state them by employer to employé, which would tend to expose any hidden and unusual danger to be encountered in the course of the employment, to a degree beyond that which the employment fairly imports, renders the employer liable for injuries resulting therefrom to the employé. *Baxter v. Roberts*, Am. L. R., January, 1874.

MORTGAGE.

1. A MASTER CANNOT GO behind the decree of foreclosure in distributing a fund raised by the sale. He must distribute it to the parties entitled under the decree. *Rice* v. *So. Penna. &c. Co.*, Legal Int., January 2, 1874; *S. C.*, Legal Gazette, January 2, 1874.

2. A MORTGAGE MADE TO SECURE the payment of certain bonds is made for the benefit of the bondholders only, and no one can have an interest in the mortgage except as a bondholder.

Creditors cannot inquire into the good faith of a transaction by the company, unless it covers a fraud intended to affect them. *Ib.*

See BANKRUPTCY, 3.

NEGLIGENCE.

Where an inexperienced agent was left in charge of a train of cars, for the purpose of loading the cars with oil, and through his ignorance or unskilful management a collision occurred between one of the cars and

the locomotive, resulting in a fire which burned plaintiff's house, the railroad company was held responsible for his acts. *Oil Creek, &c. Co.* v. *Keighron*, Legal Gazette, January 9, 1874; *S. C.*, Legal Int., January 16, 1874.

NOTICE.

See BANKRUPTCY, 5.

NOTORIETY.

See POSSESSION.

POLICE POWER OF STATE.

See TAKING PRIVATE PROPERTY.

POSSESSION.

BY MARRIED WOMAN UNDER PAROL GIFT. — A married woman to whom possession of land is delivered under a parol gift, and who occupies the land uninterruptedly, adversely, and exclusively as her own for fifteen years, thereby acquires a complete title in herself, subject to an estate by curtesy in her husband, where the husband, although living with her, claims no independent, exclusive occupation in himself. *Clark* v. *Gilbert*, Am. L. R., January, 1874.

NOTORIETY. — Possession taken under a parol gift is adverse in the donee against the donor, and if continued for fifteen years perfects the title of the donee as against the donor. The donor in such case not only knows that the possession is adverse, but intends it to be so, and there is no occasion for any notoriety. Notoriety is only important where the adverse character of the possession is to be brought home to the owner by presumption. *Ib.*

PRACTICE.

IN U. S. COURTS. — Persons cannot be made parties to a bill in equity in the U. S. courts, by designating them by a fictitious name in the introductory part of the bill and in the prayer for process.

A service of subpœna upon persons so designated is void.

An appearance does not cure such defects in the writ and its service, or make such persons parties on the record. *Ky. &c. Co.* v. *Day*, Chicago L. N., January 17, 1874.

See BANKRUPTCY, 7.

PRESUMPTION FROM LAPSE OF TIME.

See ADMINISTRATOR'S ACCOUNT.

RATIFICATION.

See CORPORATION, 1; BANKRUPTCY, 10.

SET-OFF.

NON-NEGOTIABLE NOTE, &c. &c. — A non-negotiable note payable on demand was executed to F. by the defendant. Fourteen years later the

note was transferred and delivered by F. to the plaintiff in part payment of a debt, and the plaintiff brought suit in his own name thereon under the statute authorizing a suit to be brought. At the time the plaintiff took the note of F. the defendant had for several years had a claim on book against F. greater than the note. The plaintiff knew this, and had shortly before been present at a meeting of F. and the defendant at which they had attempted to adjust their mutual claims, and at which F. had told him that he intended to apply the note in part payment of his indebtedness to the defendant. He also knew that the defendant expected such application to be made. The application however was not actually made at the time, the parties separating without having agreed as to the exact balance due. Whether the defendant could set off his claim against the note in the suit, *quære*. The authorities both English and American are in conflict and confusion upon the point.

Whether or not such set-off could be made in an ordinary case, yet here the plaintiff must be regarded as having taken the note with full knowledge of an understanding of the parties that it should be applied upon the book account of the plaintiff, and therefore as having taken it subject to the right of the defendant to make the set-off.

It was not found in terms that F. was insolvent at the time the set-off was sought to be made, but it appeared that the defendant had obtained judgment against F. more than a year before for the amount; that the debt had then been of several years' standing, and that the execution obtained upon the judgment had never been collected. *Held*, that it might reasonably be inferred that F. had not the means of payment or that they were beyond the reach of legal process. *Fitch* v. *Gates*, Am. L. R., January, 1874.

See CORPORATION, 2.

SPRING GUN.

INJURY TO TRESPASSER. — Defendant set a spring gun to protect his vineyard from trespassers; plaintiff entered the premises without permission of defendant, with the intention of taking grapes, without notice or knowledge of his spring gun, and was wounded by it. *Held*, that he is entitled to recover for the damages sustained by reason of the wound, in an action against defendant. *Hooker* v. *Miller*, Western Jurist, January, 1874.

STATE TAXATION.

NO CONSTITUTIONAL IMPLICATIONS PROHIBIT a state tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without a corresponding advantage to the United States. *U. S. R. R.* v. *Peniston*, Legal Int., January 2, 1874; *S. C.*, Legal Gazette, January 16, 1874.

STORE-KEEPER.

See BANKRUPTCY, 7.

STOCKHOLDER.

RELATIONS OF STOCKHOLDER indebted to insolvent corporation for unpaid shares considered. *Sawyer* v. *Hoag*, Chicago L. N., January 17, 1874.

TAKING PRIVATE PROPERTY.

POLICE POWER. — Before private property can be taken or charged, even under the police power of the state, there must be an *adjudication* by some tribunal authorized by law, upon the facts which render the taking proper. *City of Phila.* v. *Scott*, Legal Int., January 9, 1874.

TAX SALE.

FRAUDULENT COMBINATION. — Where the bidders at a tax sale form a ring, and each takes a bid and piece of land as his turn comes, such sale is void; and land so purchased and afterwards conveyed by tax deed cannot be held by such purchaser as against the owner. *Easton* v. *Mawhinney*, Western Jurist, January, 1874.

TITLE.

CLOUD UPON. — EQUITY JURISDICTION TO REMOVE. — The orator alleged in his bill that R., his ward, was the owner of a farm in F. and had a homestead therein, and that he was adjudged a bankrupt, and the defendant appointed his assignee, and that said homestead was decreed to R. by the court of bankruptcy; that R. absconded, and the orator was appointed his guardian; that the defendant thereafterwards obtained judgment by default against R., before a justice of the peace, without the service of process, notice, or recognizance for review, and levied his execution upon, and set off, said homestead; that it was the duty of the orator, as such guardian, to sell said homestead for the support of R.'s family, but that said levy and set-off hindered and impeded his selling the same, and constituted a cloud upon the title thereof; and prayed that said cloud be removed. The answer averred that the court of bankruptcy adjudged that R. had a *homestead interest* in said farm; that the defendant's claim upon which said judgment was founded was anterior to the acquisition of said homestead, and that said homestead was not exempt from said levy and set-off. The case was heard on bill and answer. *Held*, that the case was not one for the interposition of a court of equity. *Rooney* v. *Soule*, Am. L. R., January, 1874.

TITLE OF ACT.

The act of January 2, 1871, entitled "A further supplement to the act incorporating the city of Harrisburg, in the county of Dauphin, passed April 9, 1869," is defective in title, contains several distinct subjects, and is unconstitutional and void. *In re State Street*, Legal Chronicle, January 3, 1874.

TRESPASSER.

See SPRING GUN.

TRUST DEED.

See BANKRUPTCY, 10.

TRUST FUND.

See CORPORATION, 2.

UNITED STATES COURTS.

See PRACTICE; WAR.

VOUCHERS IN BANKRUPTCY.

See BANKRUPTCY, 7.

WAR.

RULE APPLIED IN RESPECT TO PROCEEDINGS IN THE COURTS OF A STATE IN REBELLION. — While the existence of war closes the courts of each belligerent to the citizens of the other, it does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property in their own courts, against the citizens of the other, whenever the latter can be reached by process.

Before the late civil war certain citizens of California and Illinois had brought suit in the circuit court of the United States in Texas against citizens of that State to quiet the title of the complainants to a tract of land there situated, and prevent harassing and vexatious litigation from a multiplicity of suits. On the 20th of June, 1866, a final decree was entered in that suit, the circuit court being then open in Texas, and active hostilities having there ceased, although the proclamation of the President announcing the close of the war in that State was not made until the 20th of August afterwards: —

Held, that the complainants had a right to proceed in the circuit court of the United States to protect their property situated in Texas from seizure, invasion, or disturbance by citizens of that State, so soon as that court was opened, whether official proclamation was made or not of the cessation of hostilities. *Masterson* v. *Howard*, Chicago L. N., January 10, 1874.

See INSURANCE, 8.

WILL.

1. CONSTRUCTION. — Where a will provides that an executor is "to have the control and management of all the affairs of the farm devised, and of keeping together the property during the life of the widow, and keep her provided for so long as she shall live or remain his widow, and to sell and dispose of such property as may be in the judgment of the executor necessary, from time to time, in the management of the farm and for the comfortable support of the widow, and as soon as she ceases to be his widow the property is to be sold and the proceeds divided equally among his children and heirs, the same as at her death," &c., upon an election by the widow not to take under the will, upon the application of one of the heirs, an inquest was awarded. *In re Birth*, Legal Chronicle, January 3, 1874.

2. A DEVISE OF REAL ESTATE to the son of the testator, and "in case my son should die without leaving any issue," "then the real estate to be sold," &c.: *held*, that the son took a defeasible estate, which terminated at his death. *Hickman* v. *Blackmore*, Legal Gazette, January 16, 1874.

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DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

AGREEMENT TO REFER.

NOT REVOCABLE AFTER CASE WELL ADVANCED. — An agreement to refer to arbitrators, by which important rights are gained and lost reciprocally, and which is not merely a naked power to refer, is not revocable after the referees have gone far into the case. *Paist* v. *Caldwell*, Legal Gazette, February 6, 1874.

ARBITRATION AND AWARD.

1. THE PARTIES BY WRITING HAVING AGREED TO REFER all matters in controversy in a pending suit to arbitrators, "without the right to appeal, file exceptions, or take out a writ of error," the court refused to disturb the award. *Shisler* v. *Keavy*, Legal Gazette, February 6, 1874; Legal Chronicle, February 7, 1874.

2. AN AWARD OF ARBITRATORS THAT EXCEEDS THE SUM CLAIMED in the several counts of the narr, but is not greater than the amount of damages claimed, will not be disturbed. *Graham* v. *Walker*, Legal Chronicle, February 14, 1874.

3. THE COURT OF COMMON PLEAS has no power to reform, remodel, or alter an award of arbitrators which has become an absolute judgment of record. *Ib.*

ATTORNEY.

See JUDGMENT; PARTNERSHIP, 1.

BANKRUPTCY.

1. USURY. — POSITION OF CREDITOR. — A creditor offering to prove a debt against a bankrupt estate stands in the position of a plaintiff at law, and in Illinois, if his debt is usurious, forfeits the whole interest.

The assignee can take advantage of usury, and the defence is good so long as any part of the principal debt remains unpaid. *In re Prescott*, Chicago Legal News, January 31, 1874.

2. SET-OFF. — MUTUAL DEBTS AND CREDITS. — CONSTRUCTION OF SECTION 20. — INSURANCE. — Plaintiff borrowed money of an insurance company, but before the time of payment the company became insolvent, and a decree of bankruptcy was entered against it. *Held*, that under the twen-

tieth section of the bankrupt law he can set off, as against this debt, claims for the amounts due on policies of insurance issued to him by the company, although this would give him a preference over the other creditors; that this was a case of mutual debt and credit within the meaning of this section; that in this case the money loaned not being due at the time the bill was filed, it is competent for the plaintiff to call upon a court of equity to allow a set-off. *Drake* v. *Rollo*, Ins. Law Journal, December, 1873.

BOND.

OF PHYSICIAN NOT TO PRACTISE, WITH PENALTY. — A bond conditioned that the defendant, a physician, should not practise medicine within five miles of the village of Skippackville, does not operate as a liquidation of damages for a breach of its condition, but as a penalty designed to cover any damages the plaintiff might suffer by the defendant's breach of the bond, in practising within the prescribed limits. *Bigony* v. *Tyson*, Legal Gazette, February 6, 1874.

See TREASURER.

CERTIORARI.

LACHES IN APPLICATION FOR. — A *certiorari* must be applied for within a reasonable time. Laches of the defendant will deprive him of the benefit of any exception to the proceedings had before a justice of the peace. *Scheafer* v. *Smith*, Legal Chronicle, February 14, 1874.

CONSTITUTIONAL LAW.

REGULATION OF COMMERCE BETWEEN THE STATES. — An act of a state legislature, as follows: "In the month of September, annually, each railroad company shall fix its rates of fare for passengers and freight, for transportation of timber, wood, and coal per ton, cord, or thousand feet, per mile; also, its fare and freight per mile for transporting merchandise and articles of the first, second, third, and fourth grades of freight; and on the first day of October following shall put up at all stations and depots on its road a printed copy of such fare and freight, and cause a copy to remain posted during the year, For wilfully neglecting so to do, or for receiving higher rates of fare or freight than those posted, the company shall forfeit not less than one hundred dollars, nor more than two hundred dollars to any person injured thereby and suing therefor," is not invalid as being beyond the power of the State to control commerce.

The above section is not in conflict with the Constitution of the United States, art. 1, sec. 8, which gives to Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;" it is merely a police regulation, and as such clearly within the control of the state legislature.

Semble, if the above section was a regulation of commerce, it would in the light of the authorities, of reason and of principle, be valid until superseded by the paramount action of Congress. The case of *Fuller* v. *The Chicago & Northwestern Railway Co.* 21 Iowa, 187, approved and affirmed; *Chicago & N. W. R. R. Co.* v. *Fuller*, Western Jurist, February, 1874.

CONTRACT.

1. CONSTRUCTION OF CONTRACT TO PAVE. — PREVENTION OF COMPLETION OF CONTRACT BY LEGISLATIVE ACTION. — A city ordinance authorized the paving of Beckett Street from Woodland Street to 43d Street, and the city made a contract with the plaintiffs, for paving the street between those two points. The plaintiffs were prevented from paving the whole distance by an act of Assembly, which prohibited the opening of streets through Hamilton Park. The work was done by the plaintiffs under the supervision of the commissioner of highways, and was approved by him. *Held*, that the plaintiffs having paved the street as far as they were permitted by law to pave, were entitled to recover from the property owner for the portion of the work with which he was chargeable.

A selection of the paver made by the property owners is not vitiated by the fact that it was made before the passage of the ordinance authorizing the paving, if it was allowed to remain in full force, unrevoked and unobjected to, and the work was allowed to proceed without objection.

Other points relative to contracts for paving public streets. *Phila.* v. *Fell*, Legal Intelligencer, February 13, 1874.

2. NOT TO PRACTISE "IN THE NEIGHBORHOOD." — Before a covenant not to practise medicine "in the neighborhood" can be enforced in equity, evidence must be given to show the extent of the practice sold to plaintiff. *McNutt* v. *McEwen*, Ib.

3. BY LETTER. — IMPLICATION OF LAW AS TO DEED. — A. desiring to sell, and P. to buy certain tracts of land belonging to A., entered into a correspondence by letters and telegrams, in which the lands and the prices were sufficiently described. *Held*, that the correspondence contained all the requisites of a valid contract of sale.

Where the parties agree, the one to sell and the other to purchase land at a price mentioned, the law implies that a deed will be executed and the money paid in a reasonable time. *Polhemus* v. *Ashley*, Pac. Law Reporter, January 20, 1874.

DAMAGES.

1. BY CONSTRUCTION OF RAILROAD. — In estimating damages caused by construction of a railroad, the *general* selling price of lands in the neighborhood is to be taken as a standard. *Hays* v. *Briggs*, Pittsburg Leg. Jour., February 4, 1874.

2. IN ACTIONS FOR LIBEL, the question of damages is for the jury, and the court cannot assume, as a matter of law, that the plaintiff is entitled to only nominal damages. *Lick* v. *Owen*, Pac. Law Reporter, January 20, 1874.

See BOND.

DEED.

See CONTRACT, 3.

GIFT.

DELIVERY ESSENTIAL TO VALIDITY OF. — The decedent executed an assignment, sealed it up in an envelope, and placed it in the fire-proof of the firm of which he was a member. Upon the outside of the envelope, he wrote the name of the assignee, adding, "Please send this to him on my death." After his death it was found in the fire-proof. *Held*, not to be a gift, or to create a trust in favor of the assignee, as there had been no delivery. *Taylor's Appeal*, Legal Gazette, February 13, 1874.

GUARDIAN.

POWERS OF. — A guardian is but a representative of his ward, and has no greater power in the disposition of the property of his ward than the latter would have if laboring under no disability. *Flege* v. *Garvey*, Pac. Law Reporter, February 3, 1874.

HOMESTEAD.

HOW ALIENATED. — The estate held by a husband or wife in a homestead cannot be alienated by the voluntary act of either or both of the parties, except in conformity to the statute in force at the time. *Flege* v. *Garvey*, Pac. Law Reporter, February 3, 1874.

HUSBAND AND WIFE.

1. WIFE'S REAL ESTATE. — JUDGMENT AGAINST HUSBAND. — The plaintiff purchased at public sale certain real estate owned by a married woman, and made a deposit upon account of the purchase. Ascertaining afterwards that there were numerous judgments against the husband, he rescinded the contract and sued to recover the money deposited. *Held*, that the facts showing that the property was purchased by the owner out of her own means, the plaintiff was not entitled to recover. *Schlessinger* v. *Ellis*, Legal Gazette, February 6, 1874; Legal Int., February 6, 1874.

2. INSURANCE. — A husband has an insurable interest in the buildings on a wife's real estate. *Am. Cen. Ins. Co.* v. *McLanathan*, Ins. Law Journal, December, 1873.

See HOMESTEAD.

INJUNCTION.

LICENSE TO PERFORM PARTICULAR ACT. — An injunction to restrain defendant from removing surplus soil, &c., from land, was refused where it was shown that a license to make such removal had been granted to defendant, and he had expended money on the faith of the license. *Davis* v. *Souder*, Legal Gazette, February 13, 1874; Legal Intel., February 13, 1874.

INSURANCE.

1. AGENT. — KNOWLEDGE OF BINDS PRINCIPAL. — *Held*, that an agent authorized to issue policies of insurance and consummate the contract binds the principal by any act, agreement, representation, or waiver, within the ordinary scope or limit of insurance business, which is not

known by the assured to be beyond the authority granted to the agent. *Am. Cent. Ins. Co.* v. *McLanathan*, Ins. Law Journal, December, 1873.

2. APPLICATION. — OPINION OF EITHER PARTY. — *Held*, that the opinion of the president of the company as to the truthfulness of certain statements made in the application, or what he would have done under certain circumstances, had no bearing on the case, and was properly rejected. *Held*, that it is a question of law for the court, and not to be settled by either party, how far false statements in the application affect the validity of the contract. *Wash. Life Ins. Co.* v. *Haney*, Ib.

3. ASSESSMENT. — PREMIUM NOTES AS CONSIDERATION. — STATUTE LIABILITY NOT TO BE ASSESSED TILL PREMIUM NOTES EXHAUSTED. — *Held*, that premium notes in a mutual fire insurance company are a part of the contract price, or consideration of the insurance, and constitute a reserved fund or investment of the capital of the corporation. *Held*, that the application of such an assessment as between the members themselves, must be determined by the character of the liability, which is subject to the assessment. *Held*, that the statute liability, outside of the deposit note, is not properly of the corporation, but is rather an indemnity imposed by law upon the members. *Held*, that under the general statutes, c. 58, §§ 48–54, the deposit notes should first be exhausted before resorting to the further liability imposed by law on the policy holders. *Commonwealth* v. *Mon. Mut. Fire Ins. Co.* Ib.

4. DAMAGES. — REFUSAL TO REBUILD. — Plaintiff in error gave notice that it would repair the building injured by fire, but neglected to do so for upward of a month, when it had suffered additional injury by being exposed to the weather. *Held*, that defendant in error is entitled to recover for the damages incident to this delay. *American Central Ins. Co. v. McLanathan*, Ib.

5. DESCRIPTION OF PREMISES. — ERROR IN. — The property of the defendant in error, insured by plaintiff in error, was described as situated on the corner of Second and Vine streets. As a matter of fact, the property, as was well known to the agent, was situated on the corner of Second and Elm streets, and the mistake was made by the agent in writing the policy. *Held*, that the contract was not void for uncertainty, nor is there any need of applying for a reformation of the contract, provided it appears from the face of the instrument or extrinsic facts which is the true and which the false description. *Ib.*

6. EXPIRATION OF POLICY. — One condition of a policy of life insurance was, that "within each calendar month the insured shall also pay as a mortuary assessment, the further sum of two dollars," &c. It was further provided that a non-performance of any of the conditions of the policy nullified the contract of insurance and worked a forfeiture of any claim on the part of the insured against the insurer. On one of its customary printed blank forms of receipts and notices of mortuary assessments, the insurer, April 13, 1872, gave its receipt for an assessment for March 1872, and, annexed thereto, this notice of the assessment for April: "Mortuary Assessment No. 30 will be due and payable on or before the 1st day of May, 1872." Without that assessment having been paid, the insured died on the night of May 1st, 1872, before midnight. *Held*, that the policy continued until midnight of May 1st, and the insurer was liable. *Och*

v. *Homestead Bank & Life Ins. Co.*, Pittsburg Legal Journal, February 11, 1874. (See present issue of *Law Times.*)

7. INSURABLE INTEREST. — TRUSTEE OR AGENT. — A trustee or agent having no personal pecuniary interest in the property has an insurable interest sufficient to effect an insurance thereon. *Am. Cen. Ins. Co.* v. *McLanathan*, Ins. Law Journal, December, 1873.

8. MATERIAL FACTS. — TRIVIAL FACTS CANNOT BE MADE MATERIAL. — *Held*, that neither party can, without the consent of the other, lift an unimportant and trivial thing into a material and essential fact, nor, when the contract has been executed by the other party, and it is called upon to perform its obligations, can it say that this trivial matter was essential, and that it did not exist as represented. If a party would make anything material other than what the law says is, it must be made known to the opposite party prior to the contract. *Washington Life Ins. Co. v. Haney*, Ib.

See BANKRUPTCY, 2; HUSBAND AND WIFE, 2; STATE LAW.

INTEREST.

See PLEADING AND PRACTICE, 2.

JUDGMENT.

TRANSCRIPT WHICH SHOWS ONLY APPEARANCE BY ATTORNEY. — If suit be brought in one state upon the transcript of the record of a judgment rendered by a court of record in another state, which transcript shows that the defendant was not served with process, but recites that he appeared by attorney only, the judgment debtor may, under the rule of law as settled by the supreme court of the United States, aver and prove that such attorney had no authority so to appear; and, if proven, such judgment will be void. The rule is otherwise, when suit is brought here upon a judgment rendered in Ohio. *Marks* v. *Fordyce*, Am. Law Record, January, 1874.

See PARTNERSHIP; PLEADING AND PRACTICE, 2; VENDOR AND VENDEE.

JURY.

DIRECTION BY COURT. — To warrant an unqualified direction to the jury in favor of one party or the other, the evidence must either be undisputed, or the preponderance so decided that a verdict against it would be set aside and a new trial granted. *Commonwealth* v. *Magee*, Legal Chronicle, February 7, 1874.

LACHES.

See CERTIORARI.

LANDLORD AND TENANT.

TENANT IN POSSESSION. — PROOF BY TO DISPUTE LANDLORD'S TITLE. — In order that a defendant in an action of unlawful detainer may avail himself of the rule that a tenant who did not enter under the lease, but was in possession at the time it was made, is not estopped from disputing

his landlord's title, he must prove paramount title in himself. It is not enough to dispute the title by averment. The production of a lease which is valid as a contract makes out a *primâ facie* case for the landlord. *Peralta* v. *Ginochio*, Pac. Law Reporter, January 27, 1873.

LEX LOCI.

OPERATION OF STATE LAW. — SIMILAR STATUTES IN ADJOINING STATES. — ACTION AGAINST CITIZEN OF ONE STATE FOR VIOLATION OF LAW OF ANOTHER STATE BY AGENT. — Aldrich & Co., oil merchants at Cincinnati, Ohio, upon a written order of Mary Van Camp, a druggist doing business at Metamora, Indiana, and a stranger to A. & Co., forwarded one barrel of gasoline to B., at Metamora, with instructions to deliver it to Van C., if she was responsible. The gasoline was delivered and placed in the cellar of Mrs. Van C., where, in consequence of the barrel leaking, an explosion occurred, causing the death of four persons, among them that of C. M. Van Camp, the plaintiff's intestate. By a statute of Indiana, a copy of the Ohio statute, it was unlawful to sell gasoline in that State, for illuminating purposes, before the same was inspected and branded "approved." The gasoline had not been caused to be inspected by B., at Metamora, before delivery to Mrs. Van C., and there was no evidence that A. & Co. knew for what purpose she bought it, or that they gave any instructions to B. to deliver it without inspection, or that they knew or had cause to believe that he would do so. All that A. & Co. did in the matter was done in Cincinnati. By the Code of Indiana, as by statute in Ohio, an action is given to the personal representative of the deceased who comes to his death by the wrongful act, neglect, or default of another. The plaintiff, the duly appointed administratrix of the deceased C. M. Van Camp, under the laws of Indiana, brought her action in the superior court of Cincinnati against A. & Co., for causing the death of her intestate by their wrongful act and neglect in delivering the gasoline to Mrs. Mary Van Camp, by their agent B., at Metamora, before the same was inspected. *Held*, that the law of Indiana was not violated by defendants; that there being no evidence of B.'s agency to violate the same, the presumptions against his authority to do so must prevail. Story on Agency, sec. 197; *Owens* v. *Hall*, 9 Peters, 607; *Wassem* v. *Underhill*, 2 N. H. 505, &c.

Held, also, that even if defendants did violate the law of Indiana, the plaintiff had no remedy in the courts of Ohio. *Woodward* v. *Mich. & Ind. R. R. Co.* 10 Ohio St. 121; *Richardson* v. *N. Y. C. R. R. Co.* 98 Mass. 85; *Hunt* v. *Townall*, 9 Vermont, 411, &c.

YAPLE, J., dissenting, cited: Sedgwick on Stat. 362; Westlake's Priv. International Law, sec. 158, 276, &c.; Am. Law Record, February, 1874.

LIBEL.

1. RIDICULE. — A publication which tends to reflect shame upon a person, and to hold him up to the people as an object of ridicule, is libellous. *Lick* v. *Owen*, Pac. Law Reporter, January 20, 1874.

2. PRESUMPTIONS AS TO MALICE. — If a publication be libellous and not privileged, the law implies that it was malicious.

This is not a presumption which may be wholly overcome by proof, but is a legal conclusion, which cannot be rebutted. *Ib.*

3. PROOF OF MITIGATING CIRCUMSTANCES AS AFFECTING MALICE. — Though the absence of actual malice cannot be shown as a bar, the defendant may plead and prove any mitigating circumstances to reduce the amount of the damages. *Ib.*

See DAMAGES, 2.

LICENSE.

See INJUNCTION.

LIMITATIONS.

SUSPENSION OF STATUTE OF, DURING THE REBELLION. — The point was made that the lien was lost by lapse of time; that the judgment was recovered more than three years before the filing of the bill. The judgment was recovered in March, 1861. The present suit was brought in March, 1868. *Held*, that from this period of seven years there should be excluded the time when civil war was flagrant in Arkansas, to wit, from April, 1861, to April, 1866, and that there remained but two years in which the statute of limitations was in force against the judgment. *Kauffman* v. *Kauffman*, Chicago Legal News, January 31, 1874.

LOCAL OPTION LAW.

OF PENNSYLVANIA CONSTRUED. — Under the local option acts of March 27th, 1872, and March 6th, 1873, all officers are prohibited from issuing licenses to sell liquor, in counties that have voted against license, and this prohibition includes the county treasurer.

The right to distil liquor does not carry with it the right to sell it in such counties. *Commonwealth* v. *Muller*, Legal Gazette, February 13, 1874.

LOTTERY.

"PRIZE CANDY" BUSINESS. — A "prize candy" business is a lottery, and as such illegal. *Commonwealth* v. *The Sheriff*, Legal Gazette, February 13, 1874; Legal Intel., February, 13, 1874.

MARRIED WOMAN.

ILLINOIS ACT OF 1861, RELATING TO SEPARATE PROPERTY, AND OF 1869, RELATING TO EARNINGS, CONSTRUED. — MAY BE A PARTNER IN BUSINESS AND SUED AT LAW. — The defendant below was a married woman residing with her husband, and with his consent carrying on the business of a retail grocery store in her own name, in conjunction with one Chase, who was a silent partner. The husband had no interest in the business, but was acting as clerk for the firm. The account for the collection of which suit was brought, was for goods purchased by appellant in her own name, to be used in her business. No plea in abatement for the nonjoinder of Chase was filed. The court, after discussing the act of 1861 and of 1869, giving to a married woman her own earnings, and the decisions of the court construing the same, say, in this case the goods were

purchased by the appellant, to be used in her business as proprietress of a retail grocery store. There is no pretence that they were purchased by the husband, or for his use, or under such circumstances that the law will infer his liability. They became appellant's sole and separate property, and either she must be held to pay for them, or it must be held that while married women have the right to contract and acquire property, they shall nevertheless be exempt from complying with their contracts made for that purpose. *Haight* v. *McVeagh*, Chicago Legal News, January 31, 1874.

2. CHANGE IN LAW. — DUTY OF COURT. — The legislative department has seen fit to make a radical change in the common law relating to the property rights of married women, and it is the duty of the court to enforce the law as they have made it. *Ib.*

3. CONSTRUCTION OF LAW AS TO EARNINGS AND PROPERTY. —That it is not to be supposed that it was within the contemplation of the legislature, in conferring upon married women the right to receive, use, and possess their own earnings, and to sue for the same in their own names, that it was to be limited to such only as should result from manual labor; or that in conferring upon them the right to have their separate property under their sole and separate control, and to hold, own, possess, and enjoy the same as though they were sole and unmarried, they were to be restricted in its use or disposition. That the right to control is indispensable to the acquisition of earnings, and to the unrestricted possession, control, and enjoyment of property. *Ib.*

4. RIGHT TO EARN MONEY IN TRADE. — The court perceives no reason why a married woman invested with these rights may not at least, with the consent of her husband, earn money in trade as well as at the washtub or with the sewing-machine; why she may not as well be the proprietress of a grocery store as of a farm; contract debts for goods to be used in trade as for animals and farming implements or lands or farm labor. *Ib.*

5. EFFECT OF REMOVING COMMON LAW RESTRICTIONS. — That in removing the common law restrictions upon her right to acquire and to control her property, the legislature have left her to determine, at all events when her husband shall not object, from the dictates of her own judgment, in what lawful pursuit she will engage, and whether it shall be prosecuted alone or in conjunction with others. *Ib.*

6. SEPARATE ESTATE. — LIFE INTEREST IN, WITH GENERAL POWER OF APPOINTMENT BY DEED OR WILL. — "GENERAL ENGAGEMENT," LIABILITY UNDER, IF SEPARATE ESTATE. — A settlement on a marriage under which property is settled to the wife for life, with remainder as she should, notwithstanding her coverture, by deed or will appoint, with remainder to her executors and administrators, without restraint on anticipation.

Held, to vest in equity the entire *corpus* in the wife for all purposes as fully as a similar gift to a man would vest it in him. The judgment of Turner, L. J., in *Johnson* v. *Gallagher* (3 De G., F. & J. 513; 4 L. T. Rep. N. S. 77), followed and approved.

Shattock v. *Shattock* (L. Rep. 2 Eq. 182; 14 L. T. Rep. N. S. 452) dissented from.

The proposition that a married woman's separate estate is not liable to her "general engagements" is accurate, if it is meant merely to say that goods sold to a married woman in the ordinary course of domestic life, and

contracts made by her in respect of property not her separate estate, do not necessarily impose a liability to be satisfied out of her separate estate. *London, &c. Bank* v. *Lempriere*, Am. Law Record, January, 1874.

See HUSBAND AND WIFE; WILL, 1.

MASTER AND SERVANT.

WHERE A BOY ENGAGED TO ACT AS A HELPER in a machine shop was required to ascend a ladder, among rapidly moving machinery, for the purpose of adjusting a belt, and lost his arm in consequence, it was held that his employer was liable for the injury. *U. P. R. R. Co.* v. *Fort*, Chicago Legal News, January 31, 1874.

MINISTERIAL OFFICER.

DUTY TO OBSERVE DIRECTION OF SUPERIOR. — A ministerial officer, such as a clerk, cannot be made liable for doing that which has been approved by a superior whose orders he is compelled to obey, in the absence of an allegation of some fraudulent or corrupt act on the part of both. *Kinnison* v. *Carpenter*, Pac. Law Reporter, January 27, 1874.

NEGLIGENCE.

TO BE DETERMINED BY THE JURY. — There is no absolute rule as to what constitutes negligence. It is dependent upon the particular circumstances of the case. Where the measure of duty is not unvarying; where a higher degree of care is demanded under some circumstances than under others; where both the duty and the extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proved. *Crissey* v. *H. M. & F. Passenger R. Co.*, Legal Gazette, February 6, 1874.

NEW TRIAL.

FAILURE TO PROVE SERVICES. — Where, in an action for the value of services, the plaintiff had an opportunity at the trial to prove the services and their value, but declined to do so: *Held*, that to give him an opportunity to make such proof was not sufficient ground for a new trial. *Griffith* v. *Moss*, Pac. Law Reporter, February 3, 1874.

PARTNERSHIP.

1. POWER OF RESIDENT PARTNER TO BIND NON-RESIDENT PARTNER BY APPOINTMENT OF ATTORNEY FOR THE FIRM. — APPEARANCE BY ATTORNEY. — Where partners reside in different states, but one or more of them reside in the state where the firm business is carried on, and manage and control such business, and a suit be brought in a court of record, in the state where the firm is located, against all the partners jointly, as individuals, to enforce a liability against them arising out of a partnership transaction, and the non-resident partner, or partners, are not personally served with process, and do not appear in person to defend such suit, but such resident partners employ an attorney to defend the cause, and such attorney does appear, and file a pleading, and defend for all: *Held*,

that such resident partners are the agents of the non-resident partners, for such purpose, and have implied authority and power, by virtue of such partnership, to employ such attorney on behalf of all the partners; and that his appearance for them will bind all; and a judgment rendered against them will be *conclusively* binding upon them all, as individuals.

In such case, the resident and managing partners have, by virtue of the partnership, authority to employ counsel and institute suits in the individual names of all the partners, to recover, jointly, any money or property due or belonging to the firm, or to secure indemnity to such firm and all its members against loss or liability on account of partnership transactions; and when the members of the firm are sued, jointly, such remedies may be sought by way of counter-claim or set-off, pleaded to such action, in courts where the same is permissible under their rules of practice; and if a judgment be rendered against the members of the firm upon such set-off or counter-claim, and in favor of the plaintiff in the cause, upon his demand such judgment will conclusively bind all the members of such partnership individually. *Marks* v. *Fordyce*, Am. Law Record, January, 1874.

2. ARRANGEMENT BY PARTNER TO PAY INDIVIDUAL DEBT IN GOODS. — A firm is not bound to an arrangement between one of the partners and the plaintiff, by which the plaintiff was to get goods of the firm in satisfaction of his individual bill against the partner, when the other partner did not consent to such arrangement. *Todd* v. *Lorah*, Legal Gazette, February 6, 1874.

PATENT.

1. PATENT RECALLED WITH CONSENT OF PATENTEE. — A patent in due form signed by the President, sealed with the seal, and duly recorded in the records of the general land office, issued upon a Mexican grant of land in California confirmed in pursuance of the act of Congress of 1851, and subsequent acts, was sent to the U. S. Surveyor-general for California to be delivered to the confirmees. The party entitled refused to accept the patent, on the ground that it was erroneously located, and of defects in the proceedings prior to the patent, and petitioned the commissioner of the land office on these grounds to recall the patent and order a re-survey, which was granted. *Held*, that the commissioner of the land office had power under the circumstances and with the consent of the party in interest to recall the patent and order a re-survey.

That having power to recall the patent in a proper case with the consent of the patentee, he had power to determine whether the application and evidence presented a proper case for recall, and that his action is not void by reason of any error in determining that question. *Le Roy* v. *Clayton*, Pac. Law Reporter, January 27, 1874.

PATENT CANCELLED WITHOUT CONSENT OF PATENTEE. — A subsequent survey having been made, and another patent duly signed, sealed, and recorded being in all respects regular, and in due form on its face, the Commissioner of the general land office transmitted it to the U. S. Surveyor-general for California for delivery to the proper party; but before its arrival in California recalled it by telegraph, and upon its return, without the knowledge or assent of the claimants, cancelled the patent. The claimant as soon as it was known acquiesced in, and claimed under, the patent. *Held*: —

That the patent took effect from the moment when it was signed and duly sealed:

If not, that the recording of the patent and its transmission to the Surveyor-general for California, to be delivered, constituted a delivery and the title passed.

That the title having vested under the patent, the secretary of the interior had no power to recall or cancel the patent, without the consent of the patentee.

That the patent, being valid on its face, cannot be collaterally impeached by matter *dehors* the patent, in an action at law brought in the national courts to recover the land purporting to be granted by it. *Ib.*

3. DELIVERY. — A personal delivery of a patent to the patentee is not necessary to the vesting of the title. *Ib.*

4. ISSUED BY THE PRESIDENT. — A patent for public lands issued by the President of the United States is void, unless authorized by an act of Congress, even though it be issued in pursuance of the terms of a treaty. *Parker* v. *Duff*, Pac. Law Reporter, February 3, 1874.

See UNPATENTED LAND.

PLEADING AND PRACTICE.

1. WHERE ERRONEOUS COUNTS ARE NOT SHOWN TO HAVE BEEN DISPOSED OF. — When a demurrer is sustained to two counts of an answer, and defendant refusing further to plead, judgment is rendered for plaintiff, the fact that other counts in the petition, which present conclusions of law, and are bad for that reason, are not shown to have been disposed of by the court, will not be grounds for the reversal of the judgment. This court, presuming in favor of the correctness of the ruling of the court below, will consider that the objectionable pleadings were disposed of by proper order before judgment. *Wier* v. *Crane*, Western Jurist, February, 1874; Chicago Legal News, January 31, 1874.

2. INTEREST may be added even if it makes the judgment exceed the demand indorsed on the back of the summons. *Haight* v. *McVeagh*, Chicago Legal News, January 31, 1874.

3. WHO MAY CITE TRUSTEE. — No person or party can legally cite any trustee to settle an account of his trust who has not an interest in the fund in the hands of the trustee. *Commonwealth* v. *Woods*, Legal Gazette, February 6, 1874.

4. PRACTICE IN OHIO WITH RESPECT TO TRANSCRIPT OF JUDGMENT OF COURT OF SISTER STATE. — A transcript of the record of a judgment rendered by a court of record of a sister state, upon which suit is brought in this state, is not a "deed, instrument, nor other writing whereon the action is founded," within the meaning of sec. 361 of the Code; and if a copy thereof be demanded by the defendant, as provided for in that section, and is not furnished, such transcript will still be permitted to be given in evidence on the trial of the cause; such transcript is a "written instrument as *evidence of indebtedness*" within the 117th section of the Code, and should be attached to or filed with the pleading, as therein required, but not made part of it; and, in case the same be not so attached or filed, the proper remedy of the party is to move to strike

such pleading from the files, which motion will be granted, unless the same be so attached or filed.

All rights of such party will be waived, however, if he accepts the transcript itself for inspection, and retains it for some weeks, though he may not thereafter receive it upon requesting it again. His demand of it, and not insisting upon a copy, will constitute such waiver, though he may also have demanded a copy in writing. He must rest upon such demand or waive it.

The question, whether or not there has been such waiver, is for the court to determine upon the *voir dire*, when the document is offered in evidence, and the decision of the court upon such question will not be reversed, unless clearly against the evidence offered; all of which must be set forth in the bill of exceptions. *Marks* v. *Fordyce*, Am. Law Record, January, 1874.

5. DISMISSAL OF APPEAL.—A defendant who appeared separately in an action in which there were several defendants, and who has not been served with notice of appeal, or made a party to any proceedings subsequent to the judgment, cannot move to dismiss an appeal taken by one of the other defendants. *Blane* v. *Rodgers*, Pac. Law Reporter, January 20, 1874.

6. BILL OF EXCEPTIONS. — On an appeal from an order denying a new trial there must be a bill of exceptions settled by the judge after the disposition of the motion for a new trial. *People* v. *Ah Fat*, Ib.

7. GENERAL DEMURRER. — Where there are several causes of action alleged, if any one of them is good a general demurrer will not be sustained. *Lane* v. *McElhaney*, Ib.

8. OBJECTION TO TESTIMONY MUST APPEAR IN RECORD. — In order to present a question of error in the admission of testimony it must appear from the record that the admission of the evidence was objected to, or that there was a motion to strike it out after its introduction. *Ib.*

See NEW TRIAL.

PREËMPTION.

SALE OF RIGHT TO PARTY INCAPABLE OF PREËMPTING. — When a party entitled to preëmpt land conveys his right of preëmption to a person incapable of preëmpting, the conveyance operates a liberation of the land from all claim that is held for the purposes of preëmption; and the possession of the grantee becomes thenceforth tortious as against one who had prior actual possession. *Iburg* v. *Suanet*, Pac. Law Reporter, February 3, 1874.

PROMISSORY NOTE.

REPRESENTATIONS WHEN NOTE IS GIVEN. — F., desiring to sell an interest in mining property, represented it to be a good investment, giving the source of his information, and the parties referred to corroborated his statements. *Held*, that as it was not shown that F. knew the statements to be untrue, they could not be taken as false in a sense to constitute a defence to a promissory note given for the property. *Davidson* v. *Jordan*, Pac. Law Reporter, February 3, 1874.

RECEIVER.

TROVER. — A receiver in equity may maintain trover for the wrongful conversion of goods which he has had actually in his possession. *Singerly* v. *Fox*, Legal Gazette, January 30, 1874; Legal Chronicle, February 14, 1874.

See SET-OFF.

REGULATION OF COMMERCE.

See CONSTITUTIONAL LAW.

RIOT.

KNOWLEDGE OF, OR PARTICIPATION IN, BY OWNER OF PROPERTY DESTROYED. — Where the owner of property has information of a threatened riot and uses no diligence to give notice thereof to the proper authorities of a city and county, he cannot recover from the city or county for the value of the property if it be destroyed by the mob.

Where a party instigates or participates in a riot, he cannot recover for property destroyed by the rioters. *Wing Chung* v. *Los Angelos*, Pac. Law Reporter, January 20, 1874.

SET-OFF.

CREDITORS PURCHASING AT A RECEIVER'S SALE cannot pay for goods by a set-off. *Singerly* v. *Fox*, Legal Gazette, January 30, 1874; Legal Chronicle, February 14, 1874.

See BANKRUPTCY, 2.

SHERIFF'S DEED.

A PARTY WHO RELIES ON A SHERIFF'S DEED must produce not only the judgment and the sheriff's deed, but also the execution under which the property was sold. *Quirk* v. *Falk*, Pac. Law Reporter, January 27, 1874.

See VENDOR AND VENDEE.

STATE LAW.

CONTRACTS OF INSURANCE IN VIOLATION OF. — The appellants, not being authorized by law to do business in the State of Kentucky, brought suit to recover against the appellee the amounts due on certain notes which Wayley, an accredited agent of the appellants, or a mere insurance broker, had taken for premiums on policies delivered to the appellee. *Held*, that the contracts were in violation of law, and could not be enforced in that State. *Held*, that the legislature had power to prescribe and regulate by law the terms and conditions upon which insurance companies of other states should be allowed to do business in Kentucky, and also to make the business of such companies as disregarded the law, to be wholly unlawful. *Franklin Ins. Co.* v. *L. & A. Packet Co.*, Ins. Law Journal, December, 1873.

See LEX LOCI.

STOCK.

SALE OF "SHORT." — Every sale of stocks "short" is not *ipso facto* a wager. *Manton* v. *Gheen*, Legal Gazette, February 6, 1874.

TREASURER.

LIABILITY OF SCHOOL DISTRICT TREASURER IN IOWA. — A treasurer of a school district whose bond is conditioned that he shall truly to the best of his ability and according to law, fulfil the duties of his office, cannot plead as a defence in an action on his bond to recover money of the district, received and not paid by him, that it was accidentally burned without his fault. *Township of Union* v. *Smith*, Western Jurist, February, 1874.

UNPATENTED LANDS.

THE UNPAID PURCHASE MONEY of unpatented lands creates no personal liability to the Commonwealth on the part of the possessor of such lands. *Commonwealth* v. *Woods*, Legal Gazette, February 6, 1874.

USURY.

See BANKRUPTCY, 1.

VENDOR AND VENDEE.

VENDEE HOLDING UNDER AGREEMENT AND PART PAYMENT OF PURCHASE MONEY. — JUDGMENT. — JUDICIAL SALE. — TITLE. — A vendee who holds possession under articles of agreement and payment of part of the purchase money has such an interest in the land as can be made the subject of lien, and be bound by the entry of a judgment against him, and if sold on such judgment, the proceeds will be awarded to the judgment creditors and not to the original vendor.

If the vendor recovers judgment for the unpaid purchase money, and sells the property by a process on said judgment, the purchase money unpaid will be taken out of the proceeds of the sheriff's sale, and the vendee of the sheriff will take the entire estate.

When the Commonwealth proceeds to collect her claim by a *scire facias*, and a judicial sale is had, the sheriff's vendee takes a perfect title, nor does the legislation to facilitate their collection change the nature of the claim. *Commonwealth* v. *Woods*, Legal Gazette, February 6, 1874.

VERDICT.

RULE AS TO SETTING ASIDE. — The verdict of a jury will not be set aside unless the preponderance of the evidence against it is so great as to show that the jury must have been under the influence of passion or prejudice. *Iburg* v. *Suanet*, Pac. Law Reporter, February 3, 1874.

WILL.

1. MARITAL RIGHTS OF HUSBAND, AND PENN. STATUTE OF 1848. — The act of 1848, securing to married women their property, destroyed the marital rights of the husband in his wife's estate at common law; and

therefore when the suspension of decedent's power over an estate, devised to her "for her sole and separate use," ceased at her death, the husband had no marital rights of property to which he could return. *Appeal of Girard Ins. Co.*, Legal Gazette, January 30, 1874.

2. CONSTRUCTION OF DIRECTION TO INVEST. — A direction, in the will in question, to invest the proceeds of decedent's estate "after settlement and his just debts are paid," held not to work a conversion of the real estate, but only to apply to the personalty. *Ib.*

3. "WHO SHALL THEN BE LIVING" CONSTRUED. — A devise of all the remainder of the testator's estate not given to his wife, to those of his children "who shall *then* be living," *held* to refer to the children living when the property vested in them, to wit, at the testator's death. *Creson's Appeal*, Legal Gazette, February 6, 1874; Legal Int., February 6, 1874.

4. THE MEANING OF WORDS used by a testator depends upon the meaning of such words at the time they were used. *Board of Missions* v. *Society for Advancement of Christianity, &c.* Legal Intelligencer, February 13, 1874.

5. CHARITABLE BEQUEST. — HOW ADMINISTERED. — The bequest for missionary work in the diocese of Pennsylvania is a charity to be administered upon the enlarged and liberal principles which courts of equity have always applied to such trusts. *Ib.*

6. CONSTRUCTION OF PENNA. ACT OF APRIL 18, 1853. — A will directed a certain part of the income of the estate to be paid for the maintenance of a minor child. The accumulations that accrued above the part so paid were directed to be incorporated into the body of the estate, of which the said minor after her arrival at full age, was to have the entire interest during her life. *Held*, that under the act of 18th April, 1853, that part of the will that directed the accumulations to be so incorporated fails, and that such accumulations revert to, and form part of the estate of the child. *Appeal of Penna. Co. for Ins. of Lives*, Legal Gazette, February 13, 1874.

7. WHERE "INCOME" OR "INTEREST" IS BEQUEATHED, it begins to run from the death of the testator, if the fund is productive and the estate free from debt.

An auditor refused to allow interest until one year after the death, and upon exception to his report, the court sustained the exception. *Sergeant's Appeal*, Ib.; Legal Intel. February 13, 1874.

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DIGEST OF CASES

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ABBREVIATIONS.

Cent. L. J. ..... *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.
Pittsb. L. J. ..... *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
L. Chron. ..... *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
Am. Law Rec. ..... *American Law Record*, Cincinnati, O., HERMAN M. MOOS.
Chicago L. N. ..... *Chicago Legal News*, Chicago, Ill., MYRA BRADWELL.
West. Jur. ..... *Western Jurist*, Des Moines, Iowa, MILLS & CO.
Leg. Gazette ..... *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.
Leg. Int. ..... *Legal Intelligencer*, Philadelphia, Pa., H. E. WALLACE.
Pac. Law Rep. ..... *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
Daily Reg. ..... *Daily Register*, New York., 303 BROADWAY, N. Y.

ACCOUNT.

See AUDITORS; EXECUTORS AND ADMINISTRATORS, 3.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

AGENCY.

A BILL BROKER will not be presumed to be the agent of the party to whom he sells commercial paper. Such agency, if alleged, must be proven by competent and sufficient testimony. *Gilmore* v. *Moorhead*, Pittsb. L. J., March 4, 1874.

ALTERATION OF NOTE.

See PARTNERS, 3.

ARBITRATION.

AN AGREEMENT TO REFER TO ARBITRATORS, by which important rights are gained and lost reciprocally, and which is not merely a naked power to refer, is not revocable after the referees have gone far into the case. *Paist* v. *Caldwell*, Pittsb. L. J., March 4, 1874.

ASSUMPSIT.

See PAUPERS.

ATTACHMENT SUITS.

1. PUBLICATION. — The statute (Revised Statutes, 1855, page 246, section 23; Session Laws 1859-60, page 4) authorizes the clerk, in vacation, after the return term, to make an order for publication in suits by attachment where the court should have made such order in term time, but has omitted to do so. *Kane* v. *McCown*, Cent. L. J., March 5, 1874.

2. FAILURE TO DESIGNATE PAPER. — The newspaper selected by the court, judge, or clerk making an order of publication, in which to publish the same, need not be designated in the order, and a failure to designate such paper will not render the judgment void. *Ib.*

3. VALIDITY OF JUDGMENT. — In attachment suits against non-residents the court acquires jurisdiction by the seizure of the property under a valid writ. There is then a case in court, and if every point arising subsequently is erroneously decided, the judgment is nevertheless valid, and can only be questioned in a direct proceeding (*Freeman* v. *Thompson*, July term, 1873, reviewed and affirmed). *Ib.*

ATTORNEYS.

1. FEES. — A stipulation in a promissory note that the maker will pay ten *per centum* on the amount thereof in case it shall be necessary to collect the note by suit, will not be regarded as a penalty, but as liquidated damages, COLE, J., dissenting. *McIntyre* v. *Cagley*, West. Jur., March, 1874.

2. DAMAGES: STIPULATED; PENALTY. — In cases of this nature the action of the court will not be defined or determined by the *terms* which the parties have seen fit to apply to the sum agreed upon. Although they have called it a "*penalty*" or "*liquidated damages*," it will be held to the one or the other, as from the nature of the contract and the surrounding circumstances, it appears that the parties intended, and in reason and justice they ought to be held. *Ib.*

AUDITORS.

ACCOUNT. — When an auditor states an account, with the facts on which the disputed items depend, exceptions to his report should be either for error in finding or in omitting to find specified facts, and this is an appeal to the testimony; or for erroneous inference or conclusion, and this assumes facts as truly found and states what they are. *Estate of Dickson*, Pittsb. L. J., March 4, 1874.

BAILMENTS.

SPECIAL DEPOSITS. — The plaintiffs below, who kept an account with the defendant, made a special deposit of certain bonds for safe keeping, paying nothing for the privilege; the bonds were stolen by the teller, who had always borne a good character.

Held: 1. That the bank was a gratuitous bailee, and as such not liable, except for gross negligence.

2. That neither the fact, that the bank might have discovered that the teller was dishonest, by a more frequent or accurate examination of his accounts, nor that he was allowed to keep the "individual ledger," which was the only book which was a check upon him, nor that he was not dismissed, when it was discovered that he had made a successful speculation in stocks, was such negligence as to render the bank liable.

3. That nothing short of knowledge or reasonable grounds of suspicion by the bank, that the teller was unfit to be appointed or retained, would render it liable. *Foster* v. *Essex Bank*, 17 Mass. 478, approved and followed; *Lancaster Bank* v. *Smith*, 12 P. F. S. (62 Penna. Stat.) 47 remarked on; *Scott* v. *National Bank*, Pittsb. L. J., March 11, 1874.

BANKRUPTCY.

1. CAPITAL STOCK OR SHARES — especially the unpaid subscription — constitute a trust fund for the benefit of the general creditors of a corporation. *Sawyer* v. *Hoag*, West. Jur., March, 1874.

2. This trust cannot be defeated by a simulated payment of the stock subscription, nor by any device short of an actual payment in good faith. *Ib.*

3. An arrangement by which the stock is nominally paid, and the money immediately taken back as a loan to the stockholder, is a device to change the debt from a stock debt to a loan, and is not a valid payment as against creditors of the corporation, though it may be good as between the company and the stockholder. *Ib.*

4. SET-OFF. — Section 20 of the bankrupt act was not intended to enlarge the doctrine of set-off beyond what the principles of legal or equitable set-off previously authorized. *Ib.*

5. A stockholder indebted to an insolvent corporation for unpaid shares cannot set off against this trust fund for creditors a debt due him by the corporation. The fund arising from such unpaid shares must be equally divided among all the creditors. *Ib.*

6. THE RELATIONS OF A STOCKHOLDER TO THE CORPORATION, and to the public who deal with the latter, are such as to require good faith and fair dealing in every transaction between him and the corporation, of which he is part owner and controller, which may injuriously affect the rights of creditors of the general public, and a rigid scrutiny will be made into all such transactions in the interest of creditors. *Ib.*

7. BANKRUPT ACT. — ILLEGAL PREFERENCE. — JUDGMENT IN STATE COURT. — Section 39 of the bankrupt act, as respects an insolvent debtor suffering his property to be taken on legal process, with intent to give a preference to a creditor, or to defeat or delay the operation of the act, construed, and the following propositions ruled: 1. That something more

than passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due and he is without just defence to the action, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the bankrupt act. 2. That the fact that the debtor under such circumstances does not file a petition in bankruptcy is not a sufficient evidence of such preference, or of intent to defeat the operations of the act. 3. That, though the judgment creditor in such cases may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the bankrupt law. 4. That a lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition. *Wilson* v. *City Bank*, Am. Law Rec., March, 1874.

BILLS AND NOTES.

1. WHEN a note is taken after its maturity, it is taken subject to the equities existing between the original parties arising out of or connected with the note itself — such as its accommodation character; but not to a set-off. *Long* v. *Rhann*, Pittsb. L. J., March 11, 1874.

2. ACCOMMODATION NOTE. — It is no defence to an accommodation note that it came into plaintiff's hands after maturity, if it came to him from one who acquired it for value before maturity. *Regel* v. *Cunningham*, Leg. Int., March 6, 1874.

3. EVIDENCE tending merely to show that a party in acquiring a bill of exchange or promissory note suspected the title of the holder at the time of delivery, would hardly constitute an approach towards proof that he had knowledge that such holder was guilty of a breach of trust in passing it. In this case Calvin Adams, who was a member of the firm o Whitten & Co., and Moorhead, Adams & Co., made the note to the order of Whitten & Co., who indorsed it. Adams then indorsed the name of Moorhead, Adams & Co. There was no evidence that Gilmore, who took the note, had any knowledge of any improper use of the name of Moorhead, Adams & Co., except such as he might derive from the fact that the signature was in the handwriting of the maker of the note.

Held, not to be sufficient to put him upon notice or defeat his right to recover. *Gilmore* v. *Moorhead*, Pittsb. L. J., March 4, 1874.

CONFEDERATE BONDS.

See EXECUTORS AND ADMINISTRATORS.

CONTRACTS.

1. JURISDICTION. — LIEN. — A contract to build a vessel is a contract to be performed on land, and falling within the ordinary common law, and belongs to state jurisdiction, and a state has a right to give a lien against her for work and materials entering into her construction. *The Maggie Cain*, Pittsb. L. J., March 11, 1874.

2. BIDS FOR. — The head of a department of the municipal government cannot refuse to award a contract to the lowest bidder because of irregularity in not conforming to the notice for bids. If there has been a

substantial conformance to the laws and ordinances relating to such matters, the court will not use the writ of *mandamus*, which is a discretionary writ, to compel the acceptance of the next bidder. *People* v. *Green*, Daily Reg., March 7, 1874.

CORPORATIONS.

See BANKRUPTCY.

COURT-HOUSE.

See EXECUTION SALES, 1.

DAMAGES.

See ATTORNEYS, 2.

DICTA.

See SUPREME COURT.

DOMICIL.

1. WILL. — The decedent, Dr. Gibson, executed a will in Rhode Island, in 1865, being at the time domiciled in that State. In 1867, being in Philadelphia, he published another will, which, after his death, was admitted to probate in Philadelphia. Upon an appeal from the register granting probate of said will, upon the ground that, at the time of the execution of the will in Philadelphia, Dr. Gibson's domicil was in Rhode Island, and that the will, not being executed according to the laws of that State, was void; and further, that the register in Philadelphia had no jurisdiction of the matter; the register's court sustained the Philadelphia will, holding that the testimony showed that his domicil at the time was Philadelphia. Upon appeal, this decision was reversed, the supreme court holding, that from the testimony it appeared that his domicil was in Rhode Island, and not in Philadelphia, at the time of execution of the Philadelphia will. *Carey's Appeal*, Leg. Gazette, March 6, 1874.

2. Residence, and the intention of making the place a home of the party, constitute a domicil. The residence of the testator in Philadelphia, not being of the character required, his domicil was not in that city. *Ib.*

EJECTMENT.

PRACTICE UPON DEATH OF DEFENDANT. — DOWER. — QUARANTINE. — Where in an action of ejectment against a party whose title has been vested in the plaintiff by an execution sale, such party dies during the pendency of the action, and his widow, who is entitled to dower and quarantine, is made a party defendant, the suit may proceed to judgment for plaintiff, and the rights of the widow will be secured by ordering a stay of execution until dower is assigned. *Kane* v. *McCown*, Cent. L. J., March 5, 1874.

ESTOPPEL.

See PRACTICE.

EXECUTION SALES.

1. COURT-HOUSE. — Where the regular court-house cannot be used, and another building at the county seat is procured, in which the circuit court holds its session, execution sales made at such building are valid, and would be invalid if made at the deserted court-house. *Kane* v. *McCown*, Cent. L. J., March 5, 1874.

2. BY SHERIFF AFTER EXPIRATION OF TERM OF OFFICE. — Where a sheriff who has made a levy of an execution goes out of office, by reason of the expiration of his term, he has the power to retain the execution and proceed to advertise, sell, and make a deed to the property levied upon, or he may turn the same over to his successor; and a sale made by either officer is valid. *Ib.*

3. IF COURT NOT HELD AT RETURN TERM. — Where a sale is not made at the return term of an execution which has been duly levied, by reason of no term of court being held, the execution does not become *functus officio*, and the sale may be made at any subsequent term of court without any writ of *venditioni exponas*. *Ib.*

EXECUTORS AND ADMINISTRATORS.

1. CONFEDERATE BONDS. — An investment by an executor in Confederate bonds, made during the war, by authority of a probate court in Alabama, was illegal, and he can be compelled to account to the legatees for the money so invested. *Horn* v. *Lockhart*, Leg. Gazette, March 6, 1874.

2. FOREIGN EXECUTORS. — Since the act of April 8, 1871, a foreign executor can transfer stock, and the company is not obliged to see that the will gives the executor the power to assign or dispose of the stocks; it is to be presumed that it does. *Williams* v. *The Pennsylvania R. R. Co.*, Leg. Int., March 6, 1874.

3. ACCOUNTS. — Administrators being jointly liable for the estate committed to them, and their account being their settlement with those interested in the estate, disputes between themselves about their respective services and compensation, or about their several receipts and expenditures, are no proper part of such an account, and cannot be allowed to embarrass the settlement thereof. *Estate of Dickson*, Pittsb. L. J., March 4, 1874.

4. When administrators pay a claim according to a settlement made by the intestate, and the auditor finds that he was mentally incompetent to make the settlement, and disallows the payment, his decision will be reversed where the evidence shows only feebleness of mind and body and no symptom of insanity, and there is no evidence of fraud or undue influence. *Ib.*

5. But in cases of serious importance the court will seek to avoid injustice by correcting errors, even when they are defectively assigned. *Ib.*

6. The exception in such a case ought to be to the auditor's finding of fact, and not to the inference from it, that the payment is disallowed. *Ib.*

FIRE COMPANY.

1. CONTRIBUTING members of a fire company declared to be entitled to a distributive share of the property of the company. *Neptune Hose Co.'s Appeal*, Leg. Gazette, March 6, 1874.

2. An agreement between two fire companies to merge the two corporations into one, declared not binding upon the members not consenting. *Appeal of Fame and Western Hose Companies*, Leg. Gazette, March 6, 1874.

FISHING

The right of fishing in a river is subordinate to that of navigation; but this does not excuse the master of a vessel from running into and damaging a net of a fisherman, where he could change the course of the vessel *without prejudice to the reasonable prosecution of his voyage*, and thus avoid the net. *Cobb* v. *Bennett*, Leg. Gazette, March 6, 1874.

FOREIGN EXECUTORS.

See EXECUTORS, AND ADMINISTRATORS, 2.

FOREIGN JUDGMENTS.

When a judgment from another state is sought to be enforced in the courts of this State, it is competent to our tribunals, upon the plea of *nul tiel record*, to determine whether the court rendering the judgment sought to be enforced had jurisdiction of the person against whom the judgment is rendered, and of the subject matter of the suit. *Barnett* v. *Oppenheimer*, Am. Law Rec., March, 1874.

GUARANTY.

INDORSEMENT BY STRANGER. — A note was made by W. to T., and before delivery to T. was indorsed in blank by P. and R., who were partners of W. *Held*, P. and R. were guarantors, and not successive indorsers. *Phalman* v. *Taylor*, Chicago L. N., March 7, 1874.

HUSBAND AND WIFE.

LIABILITY OF WIFE'S PROPERTY TO HUSBAND'S DEBTS. — Where the wife's personal property is left for a time under the husband's control, and she afterwards resumes the sole control of the same before it is seized for the husband's debts, it is discharged from liability for the husband's debts, without filing the notice specified in section 2502 of the Revision, and without reference to the fact of its being under the husband's control when the debt was contracted, or of the knowledge of the creditor as to her rights when he extended credit. *Miller* v. *Steele*, West. Jur., March, 1874.

INDORSEMENT.

See GUARANTY.

INSOLVENCY.

See SALES, 2.

JUDGMENTS.

1. PAID JUDGMENT. — SALE. — A sale of lands under an execution issued upon a judgment which had been fully paid is void. *Lee* v. *Rogers*, Pac. Law Rep., March 3, 1874.

2. ASSIGNEE OF SAID JUDGMENT. — W. had a judgment against C., which was the first lien on his property. T., also, had a judgment, which was the second lien on the property. C. paid W.'s judgment in full, but took an assignment of it in the name of his hired man, who paid nothing for it. Afterwards, to avoid an attachment, C. confessed a judgment in favor of L., for a debt previously due him, which became a lien upon the property, and, in order to give L. a preference over T., C. procured an assignment to him of W.'s judgment, for which no additional consideration was paid; but L. was not aware that it had been paid. C. afterwards confessed a judgment in favor of F., which also became a lien on the property. L. afterwards sold the lands on W.'s judgment and became the purchaser. Afterwards F. became purchaser of the same lands under his own judgment. *Held*, 1. That as to F., L. was not a *bonâ fide* assignee of W.'s judgment for a valuable consideration; and that his sale was void. 2. That by his purchase F. acquired the title to the land. *Ib.*

3. POWER OF ATTORNEY. — INCIDENTAL POWERS. — L. executed a power of attorney to H. authorizing him to collect his said judgments against C., by sales under execution, &c., to receive the money thereon, "arbitrate or compound" the same, and for that purpose to employ counsel. After the aforesaid sales, F. brought an action against L., to annul the said sales and conveyances to L., as clouds on his, F.'s, title. H. consulted counsel who advised him that the said sales under W.'s judgment after payment were void, and L.'s title invalid. *Held*, that as incident to the powers expressly given to collect said judgment, arbitrate and compound the same in connection with subsequent instructions from L., by letter, H. had power to authorize counsel to appear in said action and consent to a judgment annulling said sales upon terms that enabled him to realize the amount due to L. on his judgment. *Ib.*

See ATTACHMENTS, 3; FOREIGN JUDGMENTS.

JURISDICTION.

See CONTRACTS.

JURY.

See NEGLIGENCE, 3.

LIEN.

See CONTRACTS, 2.

MARRIAGE.

1. COHABITATION. — Neither cohabitation, nor reputation of marriage, nor both, is marriage: when conjoined they are evidence from which a

presumption of marriage arises. *Yardley's Appeal*, Pittsb. L. J., March 11, 1874.

2. The facts of the case showing only an inconstant cohabitation and a divided reputation of marriage, the claimant was held not to be the wife of decedent. *Ib.*

NEGLIGENCE.

1. KILLING A CHILD. — In an action against a railroad company for killing a child two years and two months old, the question as to the position of the child, whether the engineer could see it, and the rate of speed of the train, were properly left to the jury. *Phila. & Read. R. R. Co.* v. *Long*, Leg. Int., March 6, 1874.

2. The court below charged that the fact that the child was found in the street affords strong presumption of negligence; but the jury were to consider whether the mother took reasonable care of the child; if she did, it was negligence. *Held*, correct. *Ib.*

3. JURY. — As a general rule, a question of negligence must be submitted to a jury. Where the measure of duty is ordinary and reasonable care, it is always a question for the jury. There is no absolute rule as to what constitutes negligence. *Crissey* v. *Hestonville, &c. Co.* Leg. Int., March 6, 1874.

4. MEASURE OF DUTY. — Where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others, where both the duty and extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proved. Where negligence is concurrent, a child will not be held to the exercise of the same degree of care and discretion as an adult. *Ib.*

5. STOPPING CARS. — It is the duty of a railway company to cause its cars to come to a full stop to permit a passenger to get off. *Ib.*

NONSUIT.

A PEREMPTORY NONSUIT under the act of April 14th, 1846, is such a determination of an issue under the sheriff's interpleader act as will operate to forfeit the bond if the goods be not forthcoming. *O'Neill* v. *Wilt*, Leg. Gazette, March 6, 1874.

NUL TIEL RECORD.

See FOREIGN JUDGMENTS.

OBITER DICTA.

See SUPREME COURT.

PARTNERS.

1. AUTHORITY TO BIND OTHERS. — As between the firm and third persons dealing with it in good faith, it is immaterial whether one of the partners is acting fairly with his copartners in the particular transaction or not. If the partner act within the apparent scope of his authority and professedly for the firm, his acts and representations are binding on the

firm, in favor of an innocent third party, however grossly, in point of fact, he may violate his duty towards his copartners. *Phalman* v. *Taylor*, Chicago, L. N., March 7, 1874.

2. W. borrowed money of T., which was obtained on checks of T., payable to H. J. P. & Co., and gave to T. his note therefor, with blank indorsement of P. and R. thereon. W. was a partner and also bookkeeper of the firm of H. J. P. & Co., had charge of their bank account, and in certain cases was expressly authorized by his copartners to fill up notes already indorsed in blank by them. It was admitted that the indorsements of P. and R. were genuine, but it was claimed on their behalf, under plea *non est factum*, that they were not intended to guarantee a note of W. to T.; *held*, as it was apparently a transaction on account of the business of the firm, P. and R. were, in absence of evidence of bad faith on part of T., bound by acts of W. *Ib.*

3. ALTERATION OF NOTE. — It was found, by special verdict, that the words "payable at 53 Lake Street" were written in the note by T. after P. and R. had indorsed it in blank, without the knowledge of P. and R., but with the knowledge and authority of W. before delivery of the note; *held*, the alteration was material, but as W. had power to bind the firm by borrowing money, executing notes, or filling up notes under blank indorsements, he necessarily had the power to fix the amount, time, and place of payment of such notes, and his assent to change of note, by adding place of payment, was presumedly the assent of the firm, and did not invalidate the note. *Ib.*

4. SPECIAL VERDICT. — The special verdict finds the place of payment was added to the note by T., after P. and R. had indorsed it in blank, without their knowledge or authority, but with the knowledge and authority of W. the maker. While express knowledge and express authority are questions of fact, there are also implied knowledge and implied authority, and in this case the special finding of the jury must be understood to refer only to express knowledge and authority, and is not, therefore, inconsistent with the general finding. *Ib.*

PAUPERS.

1. AN ACTION OF ASSUMPSIT can be maintained by a county against a poor district for the maintenance of an insane pauper.

2. Under the act of 1845, a poor district is not liable for such maintenance until the settlement of the pauper is decided by the court to be in such district, and notice of such decision given to the district authorities. *Directors of Poor* v. *Montour Co.* Pittsb. L. J., March 11, 1874.

PENALTY.

See ATTORNEYS, 2.

PRACTICE.

1. ESTOPPEL. — WAIVER. — Where a case heard in the court below has been reviewed in the supreme court, and remanded with directions as to the decree to be entered, a party cannot on subsequent appeal assign for

error any cause that occurred prior to the former decision. *Ogden* v. *Larrabee*, Chicago L. N., March 7, 1874.

2. The fact that the point was not made by the counsel, nor considered by the court on the former appeal, does not suffice to allow it to be considered on a second appeal. There must be an end to litigation, and as the party had an opportunity to assign it for error, but failed so to do, he must be estopped from alleging at any future period error in the same record. *Ib.*

3. A party cannot assign successive errors, and errors not assigned must be deemed to have been waived. *Ib.*

4. On a second appeal a party can only review proceedings subsequent to the mandate in the first appeal. *Ib.*

PUBLICATION.

See ATTACHMENT, 1.

RAILROADS.

1. SERVICE. — That the process was served on Stewart, a director of the road, and this service was in conformity to law; that the return does not show that he was a director, only that he was reported to be so; but the record shows that he was a director when the road was leased, and in the absence of proof to the contrary it will be presumed this relation existed when the summons was served. *Washington, &c. R. R.* v. *Brown*, Am. Law Rec., March, 1874.

2. OPENING UP DEFAULT. — The court considers the effect of opening up the default and allowing the defendant to plead upon the service of the summons, providing it were defective. *Ib.*

3. ROAD RUN BY LESSEES. — That a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the State, by a voluntary surrender of its road into the hands of lessees. *Ib.*

4. ROAD RUN ON JOINT ACCOUNT. — That it has never been held that the company is relieved from liability unless the possession of the receiver is exclusive, and the servants of the road wholly employed and controlled by him. In this case the possession was not exclusive, nor were the servants subject to the receiver's orders alone; but the road was run on the joint account of the lessees and receiver, and the servants employed and controlled by them jointly. Both were therefore alike responsible for the act complained of, and if so the original company is also responsible. *Ib.*

5. CONTRACT OF TICKET-HOLDER. — The holder of a ticket issued in the name of a railroad company contracts for carriage with the company, not with the lessees and receiver. *Ib.*

6. RIGHTS OF COLORED PERSON ON THE CARS OF THIS COMPANY. — A grant by Congress was accompanied with the provision, "that no person shall be excluded from the cars on account of color." The defendant in error, a colored woman, entered the car appropriated to white ladies, was requested to leave and take a seat in another car used for colored persons, and upon her refusal so to do was ejected by force from the car she first entered. *Held*, that she was improperly ejected; that there was no occa-

sion in legislating for a railroad corporation to annex a condition to a grant of power that the company should allow colored persons to ride in its cars; that this right had never been refused; that self-interest would induce the carrier — south as well as north — to transport, if paid for it, all persons, whether white or black; that it was this discrimination in the use of the cars, on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race could not ride in the cars at all. Congress, in the belief that this discrimination was unjust, acted. It told this company, in substance, that it could extend its road within the district as desired, but that this discrimination must cease, and the colored and white race in the use of the cars be placed on an equality. *Ib.*

See NEGLIGENCE, 1.

RECEIVERS.

1. TROVER. — A receiver in equity can maintain trover for the wrongful conversion of goods which he has had actually in his possession. *Singerly* v. *Fox*, Pittsb. L. J., March 11, 1874.

2. SET-OFF. — A creditor cannot pay by a set-off for goods purchased at a receiver's sale. *Ib.*

SALES.

1. LIQUORS. — LICENSE. — The seventh section of Act of March 6, 1873, prohibiting the issue of licenses for the sale of liquors by all officers authorized by existing laws to issue the same, applies and extends to the treasurer of a county. *Commonwealth* v. *Miller*, Leg. Int., March 6, 1874.

2. INSOLVENCY AND A KNOWLEDGE OF IT at the time of a sale are evidence to go to the jury, with other facts, to show an intended fraud by the purchaser; but standing alone will not operate to rescind after a possession fully and fairly acquired. *Rodman* v. *Thalheimer*, Leg. Gazette, March 6, 1874. See JUDGMENTS, 1.

3. DIRECTION BY THE PURCHASER AS TO SHIPMENT. — Where a merchant residing in one city selects and purchases and pays for goods from merchants doing business in another city, and directs the sellers "to ship by boat" to his agents at an intermediate point, without designating a particular boat, and giving no instructions to insure against the unavoidable accidents of navigation and fire (boat-carriers exempting themselves in their bills of lading from such risks), and the vendors make a contract of carriage with the master of a boat, deliver the goods to the carrier, and take bills of lading, and before the boat leaves port upon her voyage, it is found that the contract of carriage was improvidently made, and that, under it, the goods will not go forward at all, or reach their destination in a reasonable time, the consignor has authority, by virtue of the purchaser's direction to him, "to ship the goods by boat," to rescind the contract of carriage, and to reship the same by another proper and suitable boat, such in all respects as a prudent business man could safely ship his own goods upon; and if such reshipped goods be lost in transit upon the second boat by the unavoidable accidents of navigation or fire, the owner of the boat,

with whom the contract of shipment was made, will not be liable to the purchaser of the goods for their loss. Had no directions been given to the seller by the purchaser, in relation to the shipment, the case might be different; but such express directions required the goods in kind to be so shipped as that they would actually go to their destination within a reasonable time, under all the circumstances, and if that could not be done by virtue of the contracts made by the shipper, he had a right, before the goods left port, to rescind such contracts and enter into others whereby the carriage of the goods as intended by the parties could be effected. *Toodle* v. *Rusk*, Am. Law Rec., March, 1874.

SET-OFF.

See BANKRUPTCY, 4, 5, 6; RECEIVERS, 2.

SHERIFF.

The holding of an inquisition, under the 44th section of the act of the 16th of June, 1836, is a judicial act, and must be performed by the sheriff himself. If held by a deputy it is invalid, though it may bind the sheriff. *Klopp* v. *Breitenbach*, L. Chron., March 7, 1874.

See EXECUTION SALES, 2.

SHERIFF'S DEED.

1. AMENDMENT OF. — Where a sheriff's deed erroneously recites the date of a judgment the error may be corrected in open court, and in such case no new acknowledgment of the deed is necessary. *Kane* v. *McCown*, Cent. L. J., March 5, 1874.

2. DELIVERY PRESUMED. — Where a sheriff's deed is duly executed and acknowledged, and the title of the purchaser in such deed is vested in a third party by decree of a court of equity, a delivery by the sheriff to the purchaser will be presumed, and no formal delivery is necessary. *Ib.*

SUPREME COURT.

OBITER DICTA. — Although the decision by this court of a single point may be decisive of the whole case, still an opinion upon other questions presented by the record is not an *obiter dictum;* and this is the more satisfactory practice, as it tends to prevent repeated resort to the appellate court. *Kane* v. *McCown*, Cent. L. J., March 5, 1874.

SURETIES.

THE SURETIES ON THE BOND OF AN AUCTIONEER, under the acts of April 2, 1822, and April 9, 1859, are liable for any default during the period of three years, during which the renewal of the bond could not be called for under said acts, notwithstanding the fact that the term named in the commission of the auctioneer was but one year. *Daly* v. *Commonwealth*, Leg. Gazette, March 6, 1874.

TROVER.

See RECEIVERS, 1.

TRUSTS.

1. DELEGATION OF AUTHORITY. — One trustee cannot delegate his discretion either to another or to a co-trustee. And a corporation permitting a transfer of its stock held as a trust investment, by one of two trustees transferring the same as trustee and as attorney in fact of a non-resident trustee, under a general power of attorney by which the whole management of the trust is delegated, is responsible for the consequences of a breach of trust by such trustee. *Penn. Co.* v. *McMurtrie*, Leg. Int., March 6, 1874.

2. ACTION. — Where a breach of trust is committed, a trustee, though in default, may maintain a suit in his own name for the benefit of the trust estate. *Ib.*

VERDICT.

See PARTNERS, 4.

WAIVER.

See PRACTICE.

WAR.

ACTIONS AGAINST BELLIGERENTS. — The existence of war does not prevent the citizens of one belligerent power from taking proceedings for the protection of their own property in their own courts, against the citizens of the other, whenever the latter can be reached by process. *Lee* v. *Rogers*, Pac. Law Rep., March 3, 1874.

WILLS.

CONSTRUCTION. — A devise to "my daughter E. and her children — the children taking their mother's share" — gives to the daughter a life estate only and not a fee. *Estate of Smith*, Leg. Int., March 6, 1874.

See DOMICIL.

IN the year 1785, an Indian murdered a Mr. Evans of Pittsburg. When, after a confinement of several months, his trial was to be brought on, the chiefs of his nation (the Delaware) were invited to be present at the proceedings, and see how the trial would be conducted, as well as to speak in behalf of the accused, if they chose. The chiefs, however, instead of going as wished for, sent the following answer: "Brethren! you inform us that N. N., who murdered one of your men at Pittsburg, is shortly to be tried by the laws of your country, at which trial you request that some of us may be present. Brethren! knowing N. N. to have been always a very bad man, we do not wish to see him; we therefore advise you to try him by your laws, and to hang him, so that he may never return to us again."

JUVENALIS, a widow, complained to Theodoric, king of the Romans, that a suit of hers had been in court three years, which might have been decided in a few days. The king being informed who were her judges, gave orders that they should give all expedition to the poor woman's cause, and in two days it was decided to her satisfaction. Theodoric then summoned the judges before him, and inquired how it was that they had done in two days what they had delayed for three years? "The recommendation of your Majesty," was the reply. "How?" said the King; "when I put you in office, did I not consign all pleas and proceedings to you? You deserve death for having delayed that justice for three years which two days could accomplish;" and at that instant he caused their heads to be struck off.

BY the laws of the Goths it was made penal to say of a man that he was gouty. They thought it hard enough that a man should have to suffer such a torment without being twitted about it.

A GENTLEMAN who was severely cross-examined by Mr. Dunning was repeatedly asked if he did not lodge in the verge of the court. At length he answered that he did. "And pray, sir," said the counsel, "for what reason did you take up your residence in that place?" "To avoid the impertinence of *dunning*," answered the witness.

WHEN SERGEANT COCKLE was on the northern circuit he once told a witness that he was very saucy, and followed up the remark by asking: "Pray, what sauce do you like best?" "Any sauce but Cockle sauce," was the reply.

AT a recent trial in Westminster Hall, an Irishman, who was a witness, identified the date of a transaction by his having dined at a certain house. Being asked how he could recollect that day in particular when he had dined constantly at the same table for months. "Recollect it," replied Pat; "how could I forget it? the dinner was a roast shoulder of mutton, in July, and there were no potatoes!"

AT a late assize in Limerick a boy was brought forward as a witness for the prosecution in a case of murder. He appeared so young and so ignorant, that the judge thought it necessary to examine him as to his qualifications for a witness, when the following dialogue took place: —

Q. Do you know, my lad, the nature of an oath? A. An oath! No.

Q. Do you mean to say that you do not know what an oath is? A. Yes.

Q. Do you know anything of the consequences of telling a lie? A. No.

Q. No! What religion are you of? A. A Catholic.

Q. Do you never go to mass? A. No.

Q. Do you never see your priest? A. Yes.

Q. What did he say to you? A. I met him on the mountain one day, and he bid me hold his horse, and be —— to me.

Judge. Go down; you are not fit to be sworn.

THE oath used among the Highlanders in judicial proceedings under the feudal system contained a most solemn denunciation of vengeance in case of perjury, and involved the wife and children, with the arable and the meadow land of the party who took it, all together in one abyss of destruction. When it was administered there was no book to be kissed, but the right hand was held up while the oath was repeated. The superior idea of sanctity which this imprecation conveyed to those accustomed to it, may be judged from the expression of a Highlander, who at a trial at Carlisle had sworn positively in the English mode to a fact of consequence. His indifference during the solemnity having been observed by the opposite counsel, he was asked if he would confirm his testimony by taking the oath of his own country to the same. "Na, na," said the mountaineer; "ken ye not thar is a hantle o' difference 'twixt blawing on a buke, and domming ane's ain saul?"

MR. T. O'MEARA, an Irish attorney well known for his conviviality, wit, and good nature, met at the house of a friend an Englishman of rank and fortune, whom he, according to the hospitable custom of that time, invited to his house in the country; and at the close of the visit the Englishman left Ireland with many expressions of obligation for the kindness and attention he had received. Shortly after, O'Meara for the first time visited London, and one day saw his English acquaintance walking on the opposite side of Bond Street; so he immediately crossed over, and declared, with outstretched hand, how delighted he was to see him again. The gentleman was walking with two friends of highly aristocratic cast, and dressed in the utmost propriety of costume; and when he saw a wild looking man, with soiled leather breeches, dirty top-boots, not over clean linen, nor very closely-shaven beard, striding up to him with a whip in his hand, and the lash twisted round his arm, he started back, and with a look of cold surprise, said, "Sir, you have the advantage of me." "I have sir," said O'Meara, looking at him coldly for a moment, and then walking away, "and, by Heaven, I'll keep it!"

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ABBREVIATIONS.

Albany L. J. ..... *Albany Law Journal*, New York, WEED, PARSONS, & Co.
Cent. L. J. ..... *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.
Chicago L. N. ..... *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.
Daily Reg. ..... *Daily Register*, New York, 303 BROADWAY, N. Y.
Int. Rev. Rec. ..... *Internal Revenue Record*, New York, W. C. & F. P. CHURCH.
Leg. Int. ..... *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
Leg. Gazette ..... *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.
Leg. Chron. ..... *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
Pac. Law Rep. ..... *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
Pittsb. L. J. ..... *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.

ACCOMMODATION NOTES.

See BANKS, 2, 3, 4; USURY, 3.

ADMINISTRATORS.

See INSURANCE, 3; LIMITATIONS, 2, 3.

ADMIRALTY.

1. RULE AS TO NAVIGATION. — That the rules of navigation must vary according to the exigencies of business and the wants of the public. The rules which would be applicable in a harbor where the business was light, and the passage of vessels not liable to be impeded, would be inapplicable in a great thoroughfare like the East River. In the former, it might be that vessels could with safety run across the mouths of ferry slips in going to or from their wharves, while in the latter such navigation would necessarily be hazardous. *Steamship Favorita* v. *Union Ferry Co.*, Int. Rev. Rec., March 14, 1874.

2. DEMURRAGE. — The case of the Cayuga, allowing demurrage in such cases, reported 14 Wallace, 378, adopting the views of the circuit judge of the second circuit, as stated in 7 Blatchford, 385, adhered to. *Ib.*

3. SALVAGE. — The master and owners of the tug Astoria claimed and received $5,000 from the barkentine Falkinberg and her cargo for salvage service on the Columbia River, which sum was paid by the owners of said barkentine and cargo in full of such services after a general and particular average of the loss, but the crew of the tug did not at the time make any formal claim for salvage, or expressly authorize the master or owners to make one for them, but afterwards brought suit against the latter for their proper share of said salvage: *Held*, that the master and owners of the tug have the general charge of the claim for salvage, and that the bill presented by them in the name of the "steam tug Astoria and owners for salvage services," must be construed as covering the services of the crew, who, together with the vessel and its machinery, constituted the effective agency that performed the salvage service. *Roff* v. *Wass*, Int. Rev. Rec., March 21, 1874.

4. THE DISTRIBUTION OF SALVAGE MONEY depends largely upon the sound discretion of the judge, guided by the circumstances of the case; and where the decree of the court below is not manifestly erroneous in this respect, it will be affirmed. *Ib.*

See PLEADING AND PRACTICE, 1, 2.

AMENDMENT.

See PLEADING AND PRACTICE, 1.

BANKRUPTCY.

1. INJUNCTION. — PROCEEDINGS IN BANKRUPTCY. — Injunction issued restraining defendants from collecting any rents from real estate in which the bankrupts have any legal or equitable estate, and appointment of a receiver. *Keenan* v. *Shannon*, Leg. Int., March 13, 1874.

2. AN INSOLVENT MAY BORROW MONEY AND PUT UP COLLATERALS. — There is nothing in the bankrupt law which interdicts the loaning of money to a man in Darby's condition, if the purpose be honest and the object not fraudulent. And it makes no difference that the lender had good reason to believe the borrower to be insolvent, if the loan was made in good faith without any intention to defeat the provisions of the bankrupt act; that in a season of pressure the power to raise money may be of immense value to a man in embarrassed circumstances. With it he might be saved from bankruptcy, and without it financial ruin would be inevitable. If the struggle to continue his business be an honest one, and not for the fraudulent purpose of diminishing his assets, it is not only not forbidden but is commendable, for every one is interested that his business should be preserved, that neither the terms nor policy of the bankrupt act are violated if collaterals be taken at the time the debt is incurred. *Tiffany* v. *Boatman's Savings Institution*, Int. Rev. Rec., March 14, 1874.

3. PREFERENCE AT WHICH LAW DIRECTED. — That the preference at which this law is directed can only arise in case of antecedent debt. To

secure such a debt would be a fraud on the act, as it would work an unequal distribution of the bankrupt's property, and therefore the debtor and creditor are alike prohibited from giving or receiving any security whatever for a debt already incurred if the creditor had good reason to believe the debtor to be insolvent; but the giving securities when the debt is created is not within the law, and if the transaction is free from fraud in fact, the party who loans the money can retain them until the debt is paid. *Ib.*

4. HOMESTEAD. — A bankrupt is entitled to a homestead exemption in property occupied by him as a homestead, even though he had previously waived his homestead rights in favor of a particular creditor. *In re Poleman*, Int. Rev. Rec., March 21, 1874.

5. WAIVER OF HOMESTEAD RIGHTS. — Such waiver only applies to persons claiming under the instrument in which the waiver was made, and does not enure to the benefit of the assignee or other creditors. *Ib.*

6. HOMESTEAD. — In Illinois, where the equity of redemption is less than one thousand dollars, the property should be set aside by the assignee as a homestead; where it exceeds that sum, the assignee should sell the property and pay the bankrupt one thousand dollars in cash from the proceeds, unless the property is susceptible of division, so as to set apart the homestead. *Ib.*

BANKS.

1. CONTRACT TO PAY MORE INTEREST THAN ALLOWED BY CHARTER, VOID. — That a provision in a bank charter prohibiting it from taking more than a given rate of interest, avoids a contract reserving a greater rate; that a contract to do an act forbidden by law is void, and cannot be enforced in a court of justice. *Tiffany* v. *Boatman's Savings Institution*, Int. Rev. Rec., March 14, 1874.

2. DISCOUNTING BY BANK. — That mere accommodation paper can have no effective or legal existence until it is transferred to a *bonâ fide* holder. It follows then that the discounting by a bank at a higher rate of interest than the law allows of paper of the character above mentioned made and given to the holder for the purpose of raising money upon it, in its origin only a nominal contract, on which no action could be maintained by any of the parties to it, if it had not been discounted, is usurious, and not defensible as a purchase. *Ib.*

3. ACT OF JULY 13, 1866. — Under the act of Congress of July 13, 1866, amending the internal revenue law, savings institutions are liable to tax on both the interest paid to depositors and on all undistributed sums carried to the surplus fund. *Dollar Savings Bank* v. *United States*, nt. Rev. Rec., March 21, 1874.

See USURY, 1.

BILLS AND NOTES.

See BANKS, 2; PLEADING AND PRACTICE, 4; PROMISSORY NOTE; SURETY; USURY, 3.

CONFISCATION.

A person who engaged in the rebellion, and whose real estate has been sold under the acts of Congress of August 6, 1861, and July 17, 1862, in pursuance of a judicial decree of confiscation, forfeits thereby its use during life; but such decree and sale does not work a divestiture of title, and he has afterwards the right to execute a mortgage or conveyance of the same property; which, however, will only take effect on the termination of the life of the original owner. *Wallach* v. *Van Riswick*, Chicago L. N., March 21, 1874.

COMMON CARRIERS.

RESTRICTING LIABILITY. — When a clause in the receipt given by an express company restricts the liability of the company to $50, unless the value of the package is stated in the receipt, such sum is the limit of recovery for a single package in case of loss where no value is stated. *Oppenheimer* v. *U. S. Express Co.*, Albany L. J., March 21, 1874.

CONTRACT.

1. A CONTRACT TO BUILD A VESSEL is a contract to be performed on land, and falling within the ordinary common law and belongs to state jurisdiction, and a state has a right to give a lien against her for work and materials entering into her construction. *New Schooner Maggie Cain* v. *Shakespeare*, Leg. Chron., March 21, 1874.

2. PRESUMPTION. — An executory contract, made by one claiming the benefits of a preëmption law of 1841, before making proof and payment as a preëmptor, to convey land upon receipt of a patent from the United States, cannot be enforced. *Hutson* v. *Walker*, Pac. Law Rep., March 10, 1874.

See USURY, 2.

COPYRIGHT.

1. COPYRIGHT AT COMMON LAW. — The right of an author or his assignee to the exclusive use of his literary productions exists at common law, independently of all statutes. *Isaacs* v. *Daly*, Cent. L. J., March 19, 1874.

2. JURISDICTION OF STATE COURTS. — Such being the case, the state courts have jurisdiction to protect literary property. The act of Congress of July 8, 1870, affords an additional remedy merely, and does not affect the preëxisting jurisdiction. *Ib.*

3. INFRINGEMENT. — TITLE OF PLAY. — The mere fact that a dramatic composition bears the same title as a prior dramatic composition, does not, if this circumstance is wholly accidental, and if the compositions are in other respects dissimilar, constitute the latter composition an infringement of the copyright of the proprietor of the former. *Ib.*

EJECTMENT.

1. SQUATTERS. — The owner of the fee can maintain ejectment against a squatter who has neither claim nor color of title. *Sykes* v. *Hayes*, Chicago L. N., March 14, 1874.

2. Where the squatter had admitted title in the plaintiff's grantor, it is not necessary that the plaintiff produce other evidence of title than the conveyance from his grantor. *Ib.*

3. LEGAL TITLE. — The legal title in ejectment must prevail. *Vallejo Land Asso.* v. *Viera*, Pac. Law Rep., March 10, 1874.

See PLEADING AND PRACTICE, 8.

EQUITY.

1. NECESSARY PARTIES IN EQUITY. — To a bill by a junior mortgagee against a mortgagor or his assignee in bankruptcy, prior incumbrancers are necessary parties, where there is substantial doubt as to the amounts which are due them or as to the property covered by their liens. *Sutherland* v. *Lake Superior Ship Canal, &c. Co.*, Cent. L. J., March 12, 1874.

2. SALES IN EQUITY OF DOUBTFUL INTEREST. — A court of equity will in no instance expose for sale an interest capable of being reduced to a certainty, where any doubt exists as to its character and extent. *Ib.*

3. CHANCERY PRACTICE. — FORECLOSURE OF MORTGAGE. — Where a subsequent incumbrancer is already impleaded by a prior one, a subsequent original bill, on his part, will not be sustained to foreclose his mortgage. Full relief may be granted in the first suit, either with or without a cross-bill, as exigencies exist. *Ib.*

4. WHEN INDEPENDENT SUITS WILL NOT BE PERMITTED. — When property is in the hands of a receiver, no party having interest therein; and much less will active parties be permitted, without leave of court, to seek an enforcement of their right, by an original suit. Such leave will in no case be granted where the relief sought is competent in the pending litigation. *Ib.*

5. SEPARATE SUIT BY MORTGAGE TRUSTEE. — Where a subsequent mortgage trustee, who had appeared and submitted to a receiver of the estate, resigned his trust *pendente lite*, and his successor, without leave, filed an original bill of foreclosure, it was held to be unnecessary and unwarranted. Such suit would be permanently stayed on summary application, or, upon answer and proofs, dismissed at the hearing. The rights of such successor need not be noticed in the original suit, as he would be bound by the decree. *Ib.*

6. CHANCERY PLEADING. — OFFICE OF CROSS-BILL. — Where matters are germane to and connected with the subject of a suit, they may be introduced by cross-bill, although new and not mentioned in the original bill. *Ib.*

7. MANDAMUS. — In the absence of statutory provision to the contrary, a mandamus against an officer of the government abates on his death or retirement from office. His successor in office cannot be brought in by way of amendment of the proceeding, or on an order for the substitution of parties. *United States* v. *Boutwell*, Leg. Gazette, March 20, 1874.

See BANKRUPTCY, 1.

EVIDENCE.

1. PAROL EVIDENCE. — On the vacation of an alley which appeared never to have been actually opened, and by which plaintiff's property was

bounded, parol evidence cannot be admitted to prove plaintiff's ownership and conveyance of the alley as a lot. *Meyers* v. *Robinson*, Leg. Int., March 13, 1874.

2. CROSS-EXAMINATION. — Although a greater latitude is allowable in the cross-examination of a party who places himself on the stand, than in that of other witnesses, still, where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent is very largely subject to the control of the court in the exercise of a sound discretion; and the exercise of that discretion is not reviewable on a writ of error. *Rea* v. *Missouri*, Int. Rev. Rec., March 21, 1874.

3. OBJECTION TO THE INTRODUCTION OF EVIDENCE must be specifically taken at the trial. *Gardiner* v. *Schmaelzle*, Pac. Law Rep., March 10, 1874.

4. POWER OF ATTORNEY TO SELL LAND. — Where the plaintiff in ejectment claimed title to a lot of land under a deed executed by authority of a power of attorney to sell "all lots now unsold." *Held*, that the power of attorney was admissible in evidence without proof that the lot was unsold. *Ib.*

FEDERAL COURT.

POWER OF FEDERAL COURT TO ORDER SUIT TO BE INSTITUTED IN STATE COURT. — The late decision in *Marshall* v. *Knox*, 16 Wall. 551, denying the power of the district court to invade the jurisdiction of a state tribunal, where property is in its actual custody, under proceedings commenced anterior to the bankruptcy, does not deny the power of the circuit court to order all matters pending therein to be adjudicated in an original suit, subsequently commenced in such court, by an assignee in bankruptcy. It is a mere question of practice and convenience. That the property is in the hands of the court and receiver constitutes no exception to the rule. *Sutherland* v. *Lake Superior Ship Canal, &c. Co.*, Cent. L. J., March 12, 1874.

See SUPREME COURT.

INSURANCE.

1. LIFE INSURANCE. — INSURABLE INTEREST. — That Parker was a creditor of McKenty, and had such an insurable interest as would entitle him to recover in a suit against the company had it refused payment to him. *McKenty* v. *Universal Life Insurance Co.*, Chicago L. N., March 14, 1874.

2. NOT CONTRACTS OF INDEMNITY. — That the better opinion is that policies of life insurance are not like fire and marine insurance contracts of indemnity. The agreement is that upon the death of the party whose life is insured, it will pay to the person named in the policy a certain amount therein specified. *Ib.*

3. SUIT BY ADMINISTRATRIX. — This suit was brought by the administratrix of the estate of the deceased, whose life was insured, to recover the surplus over and above the amount paid Parker, the creditor, by the company; Parker was paid all that he claimed on the death of McKenty,

and gave a receipt in full and surrendered the policy: *Held*, that the plaintiff could not recover under an assignment from Parker to her, after he had been paid by the company the full amount he claimed. *Ib.*

See PLEADING AND PRACTICE, 10, 12.

INTERNAL REVENUE LAW.

1. PROMISSORY NOTE. — On a criminal information for issuing without a stamp, and with intent to evade the provisions of the internal revenue act of 1866, the following instrument: —

IRON CLIFFS COMPANY. [Five.

NEGAUNEE, Mich., *Jan.* 30, 1870.

Pay to the order of E. B. Isham, supt., or bearer,

FIVE DOLLARS,

Value received, and charge to account of

E. B. ISHAM.

To CHARLES J. CANDA, Esq., New York.

Countersigned: E. S. GREEN, Clerk.

Held, That the instrument was, in form, a draft or order for the payment of money drawn upon another than a banker or trust company, and not subject to the stamp duties imposed upon a promissory note. *The United States* v. *Isham*, Int. Rev. Rec., March 14, 1874.

2. SUITS BY GOVERNMENT. — The government is not prohibited by anything contained in the act of July 13, 1866, from employing any common law remedy for the collection of its dues. The rule that statutory remedies exclude the common law remedy is for others not for the government, it being settled that so much of the royal prerogative as belonged to the king in his capacity of *parens patriæ*, or universal trustee, enters as much into our political state as it does into the principles of the British Constitution, which establishes the principle that the king is not bound by any act of parliament unless he be named therein by special and particular words. *Dollar Savings Bank* v. *United States*, Int. Rev. Rec., March 21, 1874.

See BANKS, 3.

JUROR.

DISQUALIFICATION OF. — A juror, who has formed an opinion as to the guilt or innocence of the prisoner, *which it would take some evidence to remove*, is disqualified. *Staup* v. *Commonwealth*, Leg. Int., March 20, 1874.

LEASE.

SURETY. — A was surety on a lease renewable from year to year, and having given six months' notice that he would not continue surety after the end of the current year; *held*, that he having died in the mean time, his estate was not liable for any rent in arrear after that date. *Estate of De Silver*, Leg. Int., March 20, 1874.

LICENSE.

See PLEADING AND PRACTICE, 3.

LIEN.

MECHANIC'S LIEN. — Under the act of February 17, 1858, a lien was filed for a patent hoisting and dumping cage, against the entire leasehold estate of a colliery.

Held, That the act of assembly gave the mechanic no such lien. It confines the lien clearly to the interest of the lessees in the improvement and machinery upon which his labor and services were bestowed. *St. Clair Coal Co.* v. *Martz*, Leg. Chron., March 21, 1874.

LIFE INSURANCE.

See INSURANCE, 1, 2, 3; PLEADING AND PRACTICE, 10, 12.

LIMITATIONS.

1. STATUTE FIXING BAR WHERE CAUSE OF ACTION HAS ALREADY ACCRUED. — On the 16th day of March, 1869, the Legislature of Georgia passed an act providing that all suits of whatever nature, in which the cause of action accrued prior to the 1st day of June, 1865, should be barred, unless brought by the 1st day of January, 1870. The period thus allowed for bringing suits was nine months and fifteen days. This is held to be a reasonable period in ordinary cases. *Marsh* v. *Burroughs*, Cent. L. J., March 12, 1874.

2. TWELVE MONTHS' EXEMPTION IN FAVOR OF ADMINISTRATORS. — By the Georgia Code, § 2548, an administrator is not liable to suit until one year from the date of his qualification. It is held that this exemption is not repealed by the act of March 16, 1869. If the latter act had such an effect, it would probably be in contravention of the Constitution of the United States; but as it does not, it is a valid enactment. *Ib.*

3. COMPUTATION OF TIME UNDER THE TWO STATUTES. — In computing the time which will bar an action, with reference to these two statutes, it is held that the administrator is entitled, first, to the one year's exemption allowed by § 2548 of the Code, and then that the creditor of the estate is entitled to the nine months and fifteen days of the act of March 16, 1869, added thereto, in which to bring his suit, although the time within which suit may be brought may thereby be extended beyond the 1st day of January, 1870. *Ib.*

4. CONSTRUCTION OF. — In construing a statute of limitations, it must, so far as it affects rights of action in existence when the statute is passed, be held, in the absence of a contrary provision, to begin when the cause of action is first subjected to its operation. *Sohn* v. *Waterson*, Leg. Gazette, March 20, 1874.

5. TIME THE STATUTE BEGINS TO RUN. — Hence when a right of action accrued in 1854, and a statute of limitations passed in 1859 barred all actions of its kind not "commenced within two years next after the cause or right of such action shall have accrued:" *Held*, that the cause of action began to run from the date of the statute, and that suit might have been brought any time within two years from that date, and accordingly, that the statute had not summarily cut off existing rights, thus making itself unconstitutional. *Ib.*

MASTER AND SERVANT.

1. LIABILITY FOR DEFECTIVE TOOLS. — A master bricklayer is responsible for an injury caused by defective tools in the hands of his employés. *Milk* v. *Boorse*, Leg. Int., March 13, 1874.

2. WHEN THE RELATIONSHIP CEASED IS A QUESTION OF FACT FOR JURY. — A man standing on a wharf was hired by the mate of a boat desiring to sail soon, and which was short of hands, to assist in lading some goods, which were near the wharf, he not having been in the service of the boat generally, though he had been occasionally employed in this sort of work. He assisted in lading the goods, an employment which continued about two hours and a half. He was then told to go to "the office," which was on the boat, and get paid. He did so, and then set off to go ashore. While crossing the gang-plank, in going ashore, the boat hands pulled the plank recklessly in and from under his feet, and he was thrown against the dock, injured, and died from the injuries.

On a suit under a statute, by his administratrix, for the injuries done to him; the declaration alleging that he had been paid and discharged, and that after this, and when he was no longer in any way a servant of the owners of the boat, he was injured; the defence was that he had remained in the service of the boat till he got completely ashore, and that the injuries having been done to him by his fellow-servants, the owners of the boat (the common master of all the servants) were not liable. There was no dispute as to the facts, unless the question as to when the relationship of master and servant ceased was a fact. This question the court left to the jury. *Held*, that there was in this no error. *Packet Co.* v. *McCue*, Int. Rev. Rec., March 14, 1874.

3. INJURY BY FELLOW-SERVANT. — F., a boy of tender years, had been engaged, by a company owning it, in a machine shop, as a workman or helper under the superintendence of C., and required to obey his orders. After being employed for a few months chiefly in receiving and putting away mouldings as they came from a moulding machine, the boy by the order of C., ascended a ladder to a great height from the floor, among rapidly revolving and dangerous machinery, for the purpose of adjusting a belt by which a portion of the machinery was moved, and while engaged in the endeavor to execute the order had his arm torn from his body. The jury, by a special verdict, found that the order was not within the scope of the boy's duty and employment, but was within that of C.; that the order was not a reasonable one; that its execution was attended with hazard to life or limb, and that a prudent man would not have ordered the boy to execute it. *Held*, that the company was liable in damages for the injuries, and that the rule that the master is not liable to one of his servants for injuries resulting from the carelessness of another, when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury — whether a true rule or not — had no application to the case. *Railroad Co.* v. *Fort*, Int. Rev. Rec., March 21, 1874.

MECHANIC'S LIEN.

See LIEN; PLEADING AND PRACTICE, 7.

MISDEMEANOR.

A MISDEMEANOR is an act or omission for which a punishment other than death or imprisonment in the state prison is denounced by law. The breach of a city ordinance, as against drunkenness, is not a misdemeanor. *Pillsbury* v. *Brown*, Pac. Law Rep., March 10, 1874.

MORTGAGE.

1. IMPEACHMENT OF JUDGMENT ON MORTGAGE. — A judgment on a mortgage given by a wife *without joining her husband*, on land to which she held the legal title and her husband had the equitable estate, cannot be impeached collaterally except for fraud. *Appeal of Butterfield's Executors*, Pittsb. L. J., March 25, 1874.

2. DISTRIBUTION OF FUND REALIZED FROM SALE. — In distributing the fund realized from its sale on a judgment against both, the amount of the wife's interest in the land should be appropriated to the judgment *sur* mortgage according to its priority. *Ib.*

3. A MORTGAGE IN FEE IS A CONVEYANCE IN FEE within the meaning of the statute concerning conveyance. The terms of the mortgage purporting to convey in fee are equivalent to a covenant of general warranty of title running with the land, and the mortgagor cannot defeat the mortgage by asserting an after acquired title. *Viejo Land Asso.* v. *Viera*, Pac. Law Rep., March 10, 1874.

See EQUITY, 3, 5; SALES, 1, 2.

MUNICIPAL GOVERNMENT.

AWARDING CONTRACTS. — The head of a department of the municipal government cannot refuse to award a contract to the lowest bidder because of irregularity in not conforming to the notice for bids. If there has been a substantial conformance to the laws and ordinances relating to such matters, the court will not use the writ of mandamus, which is a discretionary writ, to compel the acceptance of the next bidder. *People* v. *Green*, Chicago L. N., March 21, 1874.

NEGLIGENCE.

1. POLICE OFFICER. — The city of Philadelphia is not responsible for the negligence of its police officers while engaged in the enforcement of a city ordinance. *Elliott* v. *City of Philadelphia*, Leg. Int., March 20, 1874.

2. As a general rule a *question of negligence must be submitted to a jury.* Where the measure of duty is ordinary and reasonable care, it is always a question for the jury. There is no absolute rule as to what constitutes negligence.

Where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others, where both the duty and extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proved. Where negligence is concurrent a child will not be held to the exercise of

the same degree of care and discretion as an adult. *Crissy* v. *Hestonville, &c. Railway Co.*, L. Chron., March 14, 1874.

3. NEGLIGENCE OF MASTER OF VESSEL. — Nuts in bags and boxes were shipped at New York to be delivered at San Francisco. It was shown on the trial that if nuts are stowed in the hold on this voyage they are very liable to be injured by sweat; that it is the almost invariable practice to carry them in the cabin, or cabin state rooms, and to enter them on the bill of lading as to be thus carried; and that if they are carried in the hold they are sometimes inclosed in water-tight oil casks, in order to keep them in proper condition. The packages in this case were all marked "in cabin state room." The contract of the bill of lading was that the goods should be delivered in San Francisco "in good order and condition, dangers of the seas, fire, and collisions excepted." The goods were placed in the hold without notice to the shippers, and were damaged on the voyage by sweating. *Held*, that in view of the almost invariable practice as to the stowage of nuts on this voyage, of the well known fact that if stowed in the hold they are extremely liable to be injured by sweat, and of the marks and directions on the packages in question in this case, it was culpable negligence in the master of the vessel to stow them in the hold, and that the vessel was liable accordingly. *The Star of Hope*, Leg. Gazette, March 20, 1874.

PLEADING AND PRACTICE.

1. AMENDMENT. — It is not competent to amend a joint libel against three vessels by substituting the name of the owner of one vessel for the vessel, and as to her changing it from a libel *in rem* to one *in personam*. *The Young America*, Chicago L. N., March 14, 1874.

2. ACTIONS IN REM AND IN PERSONAM. — A libel *in rem* cannot be changed into a libel *in personam* against the owner.

A joint action for collision cannot be maintained *in rem* against one vessel and *in personam* against the owner of another. *Ib.*

3. LICENSE TO THEATRES. — As there are two acts of assembly requiring licenses to theatres, an indictment against the proprietor of a theatre should allege under which act the charge is made. *Commonwealth* v. *Fox*, Leg. Int., March 13, 1874.

4. NON EST FACTUM. — Where the judgment entered on a judgment note is opened, the plaintiff cannot prove the execution of the note, if there is a plea of *non est factum*, by the record of the judgment merely. *West* v. *Irwin*, Leg. Int., March 13, 1874.

5. SATISFACTION OF A JUDGMENT. — If a vendee fails to pay the amount due and surrenders back the possession of the property, he cannot be compelled to satisfy a judgment which was to have been a part payment for the property. — *Arnold's Administrators* v. *Fitzgerald*, Leg. Int., March 13, 1874.

6. SUPREME COURT. — Where the supreme court do not think the facts alleged make a substantial matter of dispute, they will not reverse the court below and direct the register's court to frame an issue. *De Haven's Appeal*, Leg. Int., March 20, 1874.

7. SCIRE FACIAS. — MECHANIC'S LIEN. — After pleading payment to a *scire facias* on a mechanic's lien, no question as to the sufficiency of the

lien can be raised. *St. Clair Coal Co.* v. *Martz*, Leg. Chron., March 21, 1874.

8. EJECTMENT. — Under a statute which requires that in actions of ejectment where the premises are actually occupied, the declaration shall be served by delivering a copy thereof . . . . to the defendant named therein, who shall be in the occupancy of the premises, or, if he be absent, by leaving the same with some white person of the family, of the age of ten years or upwards, "*at* the dwelling-house of such defendant;" a leaving of the declaration with such a white person of the family when he is at a distance of one hundred and twenty-five feet from the house, and in a corner of the yard of the house, is not a compliance with the requirement of the statute. *Kibbe* v. *Benson*, Leg. Gazette, March 13, 1874.

9. JUDGMENT SET ASIDE. — Judgment obtained by default, on such a service, the defendant not having had actual notice of what was done, and averring a good title in himself, set aside on bill in equity. *Ib.*

10. LIFE INSURANCE. — When, under the terms of a policy of life insurance, the representative of the party assured is to furnish, within a certain time after the death of the assured, "due proof of the just claim of the assured," — if the party claiming the insurance money have within the time furnished answers written out in the presence of the insurer's agent, to certain printed questions usually furnished by the insurer, for the purpose of seeing whether the claim is just or not, and the insurer receive and keep the questions and answers without any suggestion that such preliminary proofs are insufficient, either in form or substance, — the court, on a suit for the insurance money, has no right to determine as matter of law, that the questions and answers do not establish the justice of the plaintiff's claim, and that the plaintiff is not entitled to a verdict. Questions and answers so given furnish some evidence that the claim is just; and the matter is proper for the jury, even though the contents of the paper do not as yet appear. *Life Ins. Co.* v. *Francisco*, Leg. Gazette, March 20, 1874.

11. A RULE OF COURT that "in causes tried by a jury, any special charge or instruction asked for by either party must be presented to the court in writing directly after the close of the evidence, and before any argument is made to the jury, or it will not be considered," is a reasonable rule; and the enforcement or disregard of it is matter of discretion with the court making it, and, therefore, not the subject of a writ of error. *Ib.*

12. INSTRUCTIONS TO JURY. — Where a medical man testifies that the "disease" of a person who had died, and on whose death a claim for insurance was made, "had been indigestion, torpid liver, and colic, and that he died of acute hepatitis," and several other persons, the acquaintances of the deceased, testify that they had never known him to be unwell, or if so more than very slightly, and that they considered him to be a healthy man, an instruction to the jury that the evidence was not sufficient to enable the plaintiff (who was suing for the insurance money on a policy of life insurance, previous to the grant of which the decedent had answered, in reply to the usual questions, that he had "no sickness or disease") to recover, was held to have been rightly refused; and that the jury were rightly instructed that it was for them to determine whether the deceased

had been afflicted with any sickness or disease, within the meaning of the terms as used in his answers to questions put to him prior to the issue of the policy. *Ib.*

13. CHARGE TO JURY. — It was not error for the court below to charge the jury, that upon proof that the plaintiff in error, having received a $50 note, out of which to take pay for a glass of soda water, had appropriated the entire note to his own use, could convict him of larceny. *Hilderbrand* v. *The People*, Daily Reg., March 24, 1874.

14. WRIT OF ERROR. — The return to a writ of error need not, necessarily, by requirement of statute, contain an entry of the fact that the accused was or was not asked whether he had anything to say why sentence should not be pronounced, although at common law he is entitled to have such question put to him. *Ib.*

But even if it appeared by the return that the putting of such question was omitted, the omission would only affect the sentence, and not the conviction. *Ib.*

See EQUITY; FEDERAL COURT; SHERIFFS, 1.

PROMISSORY NOTE.

1. NOTICE. — Actual notice is all that is required to charge an indorser. *Cake* v. *Stidfole*, Leg. Int., March 20, 1874.

2. AFFIDAVIT OF DEFENCE. — Statements on information made in an affidavit of defence should be averred to be believed by defendant. *Ib.*

3. CONSIDERATION. — RELEASE OF DOWER. — The plaintiff below, a married woman, released her right of dower in certain real estate, owned by her husband and defendant below, the consideration for so doing being a promissory note given to her by them jointly: *Held*, that her release of her right of dower was a good consideration for the giving of the promissory note. *Sykes* v. *Chadwick*, Leg. Gazette, March 13, 1874.

4. WIFE'S SEPARATE PROPERTY. — The note being her separate property, not acquired by gift or conveyance of her husband, she is entitled to the benefit of the statute in reference to the exclusive possession and enjoyment of the note, and to the exclusive right of suing upon it. *Ib.*

See INTERNAL REVENUE LAW.

RAILROADS.

1. FENCING TRACK WITHIN CORPORATE LIMITS. — The more satisfactory rule relating to statutes requiring the fencing of railroad tracks holds that they do not apply where it would be illegal or improper that the road should be fenced, as at the crossings of streets and alleys in a city or town, or at mills, &c., where public convenience requires the way to be left open. This, however, is the limit of the exception; and the track within the corporate limits of a city or town, at points where no such reasons apply, is as much within the statute as the track elsewhere. *Indianapolis, &c. R. R. Co.* v. *Parker*, 29 Ind. 471; *Jeffersonville, &c. R. R.* v. *Parkhurst*, 34 Ind. 501. Any exceptional case, must be proved by the railroad company, and cannot be inferred. *Flint, &c. Railway Co.* v. *Lull*, Cent. L. J., March 12, 1874.

2. FENCING AT DEPOT. — No statute can be held to require depot grounds to be fenced, without a very clear declaration to that effect, not only because such fencing is unusual, but because the convenience of the company, as well as of the public in transacting business with it, would be very seriously incommoded by such fencing, and the track of the company can be better protected, and with less impediment to business at such points, by other methods than fencing. *Ib.*

3. FENCING, A POLICE RULE. — Statutes requiring the fencing of railroad tracks are police regulations, as much for the security of passengers as for the protection of property: *Indianapolis, &c. R. R. Co.* v. *Marshall*, 27 Ind. 302; *Jeffersonville, &c. R. R. Co.* v. *Nichols*, 30 Ind. 321. *Ib.*

4. IT IS THE DUTY OF A RAILWAY COMPANY to cause its cars to come to a full stop to permit a passenger to get off. *Crissy* v. *Hestonville, &c. Railway Co.*, Leg. Chron., March 14, 1874.

RESULTING TRUST.

G. conveyed lots 1 and 2 in the town of Salem to W., and in consideration of such conveyance, said W. and wife afterwards conveyed to said G. lands belonging to said wife in exchange for said lots 1 and 2. *Held*, That in the absence of evidence to show that the conveyance of lots 1 and 2 was made to W. with the assent of his wife, there was a resulting trust in her favor, and her subsequent vendees are entitled to a decree against the heirs of W. for a conveyance of the legal title. *Nicklin* v. *Wythe*, Pac. Law Rep., March 10, 1874.

SALES.

1. SALE OF MORTGAGED PREMISES. — A court of equity may sell mortgaged premises free from incumbrances, remitting the lien holders to the proceeds at the suit of subsequent incumbrancers or other parties having rights in the equity of redemption. The power in this regard, so frequently exercised in bankruptcy, is but an application there of this principle. *Sutherland* v. *Lake Superior Ship Canal, &c. Co.*, Cent. L. J., March 12, 1874.

2. ASSIGNEE'S BILL TO SELL MORTGAGED PROPERTY. — The circuit court will entertain a bill by an assignee in bankruptcy against several mortgagees and other lien holders to ascertain the amounts due, and sell the property free from incumbrances. *Ib.*

3. ATTORNEY. — An attorney cannot bind his client by an agreement for the sale of land. *Burkhardt* v. *Schmidt*, Leg. Int., March 20, 1874.

4. SHERIFF'S SALE. — What facts are necessary to constitute a purchaser at a sheriff's sale a trustee for another, who alleges that he refrained from bidding on account of an agreement with him, discussed. *Ib.*

5. GOVERNMENT CONTRACT. — Where a manufacturer of guns agrees with the government to make and deliver, and the government agrees to receive and pay for, all the carbines of a certain kind (described), not exceeding six thousand, which the manufacturer can make within six months from the date of the contract, and the government afterwards requests that certain alterations may be made in the weapon, to effect which neces-

sarily requires some months, and the alterations (along with others of the manufacturer's own suggestion, which were judicious, and materially improved the weapon) were made; the request of the government to make the alterations implies such a reasonable extension of the time as is requisite to make them; and if the government was aware of the progress of the work, and gave no notice that it would refuse to accept the same if not delivered within the six months originally specified, it must be held to be bound by the reasonable intendment above mentioned; and if after the request to make the alterations, the manufacturer proceeded in good faith, and without unnecessary delay, the government was bound to accept the six thousand carbines, though not delivered within the six months; and having refused so to accept, is bound to pay such damages as the manufacturer has sustained by the government's said refusal. *Manufacturing Co.* v. *United States*, Leg. Gazette, March 20, 1874.

See EQUITY, 2; PLEADING AND PRACTICE, 5.

SHERIFFS.

1. INTERPLEADER. — A peremptory nonsuit on a sheriff's interpleader is such a determination of the issue as will operate to forfeit the bond if the goods are not forthcoming. *O'Neil* v. *Wilt*, Pittsb. L. J., March 25, 1874.

2. LEVY. — An actual levy is not absolutely necessary for a sheriff's interpleader. *Phillips* v. *Reagan*, Leg. Int., March 20, 1874.

See SALES, 4.

SHERIFF'S DEED.

SHERIFF'S DEED DELIVERED UPON FORECLOSURE OF MORTGAGE IN FEE. — The rule that a sheriff's deed delivered upon execution sale imports no warranty of title, but transfers to the purchaser only such estate as was held at the time by the defendant in execution, has no practical application to a sheriff's deed delivered upon foreclosure of mortgage in fee. *Vallejo Land Asso.* v. *Viera*, Pac. Law Rep., March 10, 1874.

SQUATTERS.

See EJECTMENT.

SUPREME COURT.

IN THE CONSTRUCTION OF THE STATUTES OF A STATE, and especially those affecting titles to real property, where no federal question arises, the supreme court of the United States follows the adjudications of the highest court of the state. Its interpretation is accepted as the true interpretation, whatever may be the opinion of that court of its original soundness. *Walker* v. *Marks*, Chicago L. N., March 14, 1874.

See PLEADING AND PRACTICE, 6.

SURETY.

JOINT AND SEVERAL NOTE. — Where two persons signed a note, and

one of them paid his half and received a receipt "in full for his half of the note," this does not release his liability as surety for the remaining half. *Sterling* v. *Stewart*, Leg. Int., March 13, 1874.

See LEASE.

SURVEYOR.

LAYING OUT STREETS. — The authority given to the board of surveyors under the direction of the city councils, by the act of June 6th, 1871, P. L. 1353, to confirm or reject plans or revisions of plans of surveys and regulations, invest them with power to alter or amend such plans in whole or in part, by blotting out or vacating one or more of the streets on such plans, and substituting others, or by adding new streets, and the action of the board upon any such plans unappealed from, is a finality. *In re Arch Street*, Leg. Int., March 13, 1874.

USURY.

1. CORPORATION VIOLATING ITS CHARTER. — The court does not decide whether the general law relating to usury applies to and has the same effect upon a contract made in violation of its charter by a bank as upon a contract made by an individual, but prefer to leave the decision of this question to the state tribunals. *Tiffany* v. *Boatman's Savings Institution*, Int. Rev. Rec., March 14, 1874.

2. WHEN CONTRACT EXECUTED. — That it does not follow in cases of usury, if the contract be executed, that a court of chancery, on application of the debtor, will assist him to recover back both principal and interest. It will give no relief to the borrower if the contract be executory, except on the condition that he pay to the lender the money loaned, with legal interest. Nor if the contract is executed will it enable him to recover any more than the excess he has paid over the legal interest. *Ib.*

3. ACCOMMODATION NOTES. — That the six accommodation notes which defendant claims to have been purchased from note-brokers were really taken on loans to Darby, and the illegal interest received above eight per cent. on them should be refunded; that it is true that usury is only predicable of an actual loan of money, and equally true that a negotiable promissory note, if a real transaction between parties to it, can be sold in the market like any other commodity. The real test of the salability of such paper is whether the payee could sue the maker upon it when it became due. He could do this if it was a valid contract when made, otherwise not. *Ib.*

LORD LIGONIER was killed by the newspapers, and wanted to prosecute them. His lawyer told him it was impossible; a tradesman might prosecute, as such a report might affect his credit. "Well, then," said the old man, "I may prosecute too, for I can prove I have been hurt by this report. I was going to marry a great fortune who thought I was but 74; the newspapers have said I am 80, and she will not have me."

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DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. ..... *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & Co.
Am. Law Rep. ..... *American Law Reporter*, Philadelphia, Pa., D. B. CANFIELD & Co.
Daily Reg. ..... *Daily Register*, New York, 303 BROADWAY, N. Y.
Ins. L. J. ..... *Insurance Law Journal*, New York, C. C. HINE.
Int. Rev. Rec. ..... *Internal Revenue Record*, New York, W. C. & F. P. CHURCH.
Leg. Chron. ..... *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
Leg. Gazette ..... *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.
Leg. Int. ..... *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
Pac. Law Rep. ..... *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
Pittsb. L. J. ..... *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.

ADMIRALTY.

A mariner, if he is warned of his approach toward the net of a fisherman, should change the course of his vessel if he can do so without prejudice to the reasonable prosecution of his voyage. *Cobb* v. *Bennett*, Leg. Int., March 27, 1874.

AGENCY.

See LIFE INSURANCE, 1.

ATTORNEY.

See PLEADING AND PRACTICE, 2.

ATTORNEY GENERAL.

1. DUTIES. — The power of the legislature to fix the duties of the attorney general is limited to such duties as are by their nature cognate

to those duties which were usually required of similar officers in other states at the time the Constitution was adopted. *Love* v. *Baehr*, Pac. Law Rep., March 24, 1874.

2. MAY DECLINE TO PERFORM EXTRA DUTIES. — If the legislature require of the attorney general the performance of a service not within the scope of his official duties, he may decline to perform it, without a breach of his duty as attorney general. *Ib.*

3. ATTORNEY GENERAL CANNOT ENLARGE SCOPE OF DUTIES. — If the attorney general voluntarily perform extra services, he does not thereby enlarge the scope of his official duties as a constitutional officer. *Ib.*

4. COMPENSATION FOR EXTRA DUTIES. — If the attorney general perform a service which is wholly foreign to his office, and which is not and cannot become a part of his official duty as attorney general, the legislature may allow him compensation for such services in addition to his salary as attorney general. *Ib.*

BANKRUPTCY.

PREFERENCE OF CREDITORS. — The giving of securities as collaterals by a bankrupt *when* the debt is created is not a violation of the bankrupt law, or a preference of one creditor over another, and if the transaction be free from fraud in fact, the lender of the money can retain them until the debt is paid. *Tiffany* v. *Boatman's Savings Institution*, Leg. Gazette, April 3, 1874.

BILLS AND NOTES.

1. LIABILITY OF MAKER AS SURETY. — Where two persons signed a note, and one of them paid his half and received a receipt "in full for his half of the note," this does not release his liability as surety for the remaining half. *Sterling* v. *Stewart*, Leg. Chron., March 28, 1874.

2. NOTICE OF NON-PAYMENT. — Actual notice is all that is required to charge an indorser. *Cake* v. *Stidfole*, Leg. Chron., March 28, 1874.

3. ACCOMMODATION PAPER. — Mere accommodation paper has no legal existence until it is transferred to a *bonâ fide* holder. *Tiffany* v. *Boatman's Savings Institution*, Leg. Gazette, April 3, 1874.

CHANCERY.

1. ISSUING INJUNCTIONS ON SUNDAY. — *Held*, that in certain cases a bill in chancery may be filed, and an injunction issued and served on Sunday. *Langaber* v. *Fairbury, &c. R. R. Co.*, Pittsb. L. J., April 1, 1874.

2. COURTS ON SUNDAY ANCIENTLY. — That anciently courts of justice did sit on Sunday; that the early Christians of the sixth century and before used all days alike for the hearing of cases, not sparing Sunday itself; but in the year 517 a canon was promulgated exempting Sundays, and other canons were afterwards adopted exempting other days, which were all adopted by the Saxon kings, and all confirmed by William the Conqueror and Henry the Second, and in that way became a part of the common law of England; that by these canons other days were declared unjudicial, as the day of the Purification of the Blessed Virgin Mary, the feast of the Ascension, the feast of St. John the Baptist, and All Saints and All Souls days. These were as much unjudicial days as Sunday, yet the most

devoted admirer of the common law would not hesitate to say that the proceedings of a court of justice in this State on either of those days would be valid. *Ib.*

COMMON CARRIERS.

1. CARRIERS OF LIVE STOCK are not insurers. For accidents necessarily incident *to* the live stock in transportation, they are not liable. *Louisville, &c. R. R. Co.* v. *Hedger*, Am. Law Reg., March, 1874.

2. They are bound nevertheless to extraordinary diligence, such as a prudent and careful man would exercise in the business of stock transportation. *Ib.*

3. They cannot discharge themselves from this liability by any contract with the owner of the live stock. *Ib.*

4. LIMITATION OF LIABILITY. — Common carriers may limit their liability as insurers by special agreement; but such agreement cannot be implied from the publication of notices by the carrier, unless the owner knows of such notices, and expressly assents to the limitation of liability therein contained. *Ib.*

5. NEGLIGENCE. — The loss or injury of live stock in the custody or care of the carrier is *primâ facie* evidence of negligence. But when the owner takes charge of his stock during transportation, negligence must be shown to render the carrier liable. *Ib.*

6. COMMON CARRIERS OF PASSENGERS have the legal right to make reasonable and proper rules and regulations for the conduct and accommodation of all persons who travel by their conveyances. *Coger* v. *Northwestern Union Packet Co.*, Am. Law Reg., March, 1874.

7. The *sale of a ticket* to a passenger is *a contract* to carry such passenger according to their rules and regulations. *Ib.*

8. RULES AND REGULATIONS. — They have no right however to make rules or regulations for their passengers, based upon any distinction as to race or color.

A negro woman who purchases a first class dinner ticket on a Mississippi steamboat is entitled to sit at the same table as the other passengers.

This is a right secured to her by the laws of the State of Iowa, and the Constitution of the United States.

The object of the 14th amendment to the Constitution of the United States was to relieve citizens of African descent from the effects of the prejudice theretofore existing against them; and to protect them in person and property from its spirit. *Ib.*

CONSTITUTIONAL LAW.

REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS. — To effect the removal of a cause from a state court to a federal court, under the acts of Congress for that purpose, all of the plaintiffs or all of the defendants, as the case may be, must be non-residents and must join in the petition for the removal; therefore, *held*, in an action brought in a Massachusetts court by a resident of Massachusetts against several defendants, one of whom was a resident of Massachusetts and the others non-residents, that the defendants were not entitled to a removal of the cause to the

circuit court. *Grover & Baker Sewing Machine Co.* v. *Florence Sewing Machine Co.*, Albany L. J., March 28, 1874.

CONTRACTS.

1. VOID CONTRACT. — A contract to do an act forbidden by law is void, and cannot be enforced in a court of justice. *Tiffany* v. *Boatman's Savings Institution*, Leg. Gazette, April 3, 1874.

2. USURIOUS CONTRACT. — Where a contract is usurious, the debtor, in the absence of any special statutes regulating the matter, cannot recover both principal and interest, but only the excess he has paid over the legal interest. *Ib.*

3. INVALID CONTRACT. — Non-conformity with section 38 of the Charter of 1857, and section 1 of the Act of April 17, 1861, which direct contracts to be given out founded on sealed proposals, made in compliance with public notice advertised in such newspapers of the city as may be employed for that purpose, and inserted for ten days, is fatal to the validity of a contract. *Brown* v. *The Mayor, &c. of New York*, Daily Reg., April 2, 1874.

See PREËMPTION.

CORPORATIONS.

1. CHARTER. — It is settled law that charters of corporations, other than municipal, although the objects of the corporation may be *quasi* public, are contracts within the protection of the federal Constitution. *Phila. &c. R. R. Co.* v. *Bower*, Am. Law Reg., March, 1874.

2. ACT ABRIDGING PRIVILEGE OF CHARTER. — Any act having the effect to abridge or restrict any power or privilege vested by the charter, which is material to the beneficial exercise of the franchise granted, and which must be supposed to have entered into the consideration for the acceptance of the charter by the corporators, is an impairing of the obligation of the contract within the prohibition of the Constitution. *Ib.*

3. In the *construction of a statute*, it is to be presumed that the legislature did not intend to grant to a corporation such an exemption from the operation of the general law applicable to similar corporations as would create an unreasonable monopoly or immunity at variance with constitutional principles; and when such an exemption is excluded by a fair construction implying the qualification that the statute is to operate in harmony with and subject to the general law, such a construction will be adopted. *Delancey* v. *Rockingham Farmers' Mut. Fire Ins. Co.*, Ins. L. J., February, 1874.

CUSTOMS LAWS.

See SEIZURE.

EJECTMENT.

See EVIDENCE, 3.

EVIDENCE.

1. PAROL TESTIMONY is admissible to establish the existence of a waiver of condemnation, which had been a record and become lost. *Hamberger* v. *Brooker*, Leg. Chron., March 28, 1874.

2. OBJECTION TO THE INTRODUCTION OF EVIDENCE must be specifically taken at the trial. *Gardiner* v. *Schmaelzle*, Pac. Law Rep., March 10, 1874.

3. WHERE THE PLAINTIFF IN EJECTMENT claimed title to a lot of land under a deed executed by authority of a power of attorney to sell "all lots now unsold: *Held*, that the power of attorney was admissible in evidence without proof that the lot was unsold. *Ib.*

4. AFFIDAVIT OF DEFENCE. — Statements on information made in an affidavit of defence should be averred to be believed by the defendant. *Cake* v. *Stidfole*, Leg. Chron., March 28, 1874.

See LIFE INSURANCE, 5; PLEADING AND PRACTICE, 3.

INSURANCE.

1. AN ASSIGNMENT OF A POLICY was absolute in form, passing the title unconditionally; but the receipt for the assignment contained the clause, "Said assignment to be null and void upon the payment of said note at its maturity, otherwise to continue for the sole benefit of W." *Held*, that this contract was a mortgage and not a pledge, and as the note was not paid at maturity, the policy became the absolute property of W. *Dungan's Adm'x.* v. *Mut. Benefit Life Ins. Co.*, Ins. L. J., February, 1874.

2. WARRANTY. — A discrepancy appeared between the representations made in the policy and the statements in the proofs of loss, and defendant claimed that the proofs of loss were conclusive evidence against the plaintiff that the warranty was broken. *Held*, that the representation as to the occupancy of the building was a warranty, and if broken avoided the policy.

Held, that the plaintiff was not estopped by the statement in the proofs of loss from showing that the warranty was not broken, and that evidence as to the fact of the occupancy of the building was properly admitted. *Parmelee* v. *Hoffman Ins. Co.*, Ins. L. J., February, 1874.

3. CHANGE OF TITLE IN PROPERTY INSURED. — Personal property insured by the defendants was sold by the insured during the life of the policy to the plaintiff, and the policy delivered to him. The policy contained a condition that if any change took place in the title to the property, by transfer or otherwise, the policy should become void. The plaintiff, to secure the protection of his interest by the insurance, carried the policy to an insurance broker to have whatever was necessary for the purpose done. The broker wrote in pencil on the back of the policy, "Privilege to use kerosene oil for lights — Loss, if any, payable to Charles Batchelor — Transfer," and sent it to the defendants. The secretary of the company read the memorandum, and wrote in the policy the following: "July 19, 1867. Privilege to use kerosene oil for lights. Loss, if any, payable to Charles Batchelor." This he signed in his official

character, affixed to the policy a fifty cent revenue stamp (required by law for a new policy, but not necessary for the indorsement actually made), and sent the policy back to the broker, who delivered it to the plaintiff. Before the term of the insurance expired the entire property was burned. *Held*, that the word "Transfer," in the pencil memorandum, was an important word, having a distinct meaning, and must be regarded as conveying notice to the defendants of whatever it would in the circumstances reasonably import.

Held, that the only sensible meaning that could be given to it in its connection, and in view of the use of the same term in the condition of the policy, was, that the property had been transferred to the plaintiff.

Held, that the defendants, by returning the policy to the plaintiff with the loss made payable to him, and by affixing the stamp required for a new policy, were to be regarded as having assented to the transfer of property to the plaintiff, and made the policy an operative one for his benefit.

The plaintiff offered to furnish the defendants with formal proof of the loss, but they informed him that they denied his right to recover for the loss, and that they should not receive any proofs made by him as sufficient. *Held*, to be a waiver of the proof. *Batchelor* v. *Peo. Fire Ins. Co.*, Ins. L. J., February, 1874.

4. LIBEL BY INSURER. — In case of a total loss of a cargo by collision, a libel may be brought by the insurer against the colliding vessel, after notice and proof of the loss and demand of payment, though without actual payment. *Traders' Ins. Co.* v. *Propeller Manistee*, Ins. L. J., February, 1874.

5. WHEN WILL LIE, THOUGH LOSS NOT ACTUALLY PAID. — The insured having been fully satisfied for the loss, and not intervening or opposing the prosecution of the libel of the insurer, the carrier cannot be permitted to raise the objection of non-payment of the loss before libel brought. *Ib.*

6. POLICY ISSUED IN DISREGARD OF STATUTORY REQUIREMENTS. — Where the statutes of a state require foreign insurance companies to comply with certain requirements, and declare penalties for doing business in disregard of these requirements, in case of a loss on a policy issued in disregard of such requirements, a carrier cannot be permitted to make this a defence to a libel, the loss having been paid by the company. *Ib.*

7. NOTICE OF LOSS. — Notice not given till eighteen days after loss. *Held*, not reasonable. *Trask* v. *Insurance*, 5 Casey, 198, followed and criticised; *Edwards* v. *The Lycoming Mut. Fire Ins. Co.*, Leg. Int., March 27, 1874.

8. CONTRACT OF INSURANCE. — *Held*, that in an action against an insurance company to compel it to issue a policy upon an alleged contract of insurance, there must be conclusive proof that such contract was actually made. *McCann* v. *Ætna Ins. Co.*, Ins. L. J., February, 1874.

9. *Held*, THAT DUE NOTICE OF LOSS and statements supported by affidavits are conditions precedent to recovery. *Ib.*

10. FRAUD. — INSURABLE INTEREST. — PREMIUMS. — The defendants, through R., their local agent, issued a policy of insurance for $10,000 on the life of L., a brother of the plaintiff, for the benefit of and payable

to the plaintiff. By a secret arrangement between R. and the plaintiff, R. advanced $525 toward the payment of premiums, and agreed to advance the subsequent premiums, the amounts so advanced to be refunded by the plaintiff; and it was further agreed that R. should assume the policy if requested by the plaintiff within three years, and refund to him the amount of premiums paid by him with interest, and should receive $1,000 of the sum insured, if paid by the defendants, in case L. should die within three years. L. did not know of the existence of the policy, and was not examined by a physician as the rules of the defendants required, and the plaintiff had no interest in his life except such as arose from the relationship between them. The defendants were ignorant of all these facts. In the application for insurance the plaintiff stated that he had an interest in the life of L. to the full amount of insurance applied for.

The defendants having cancelled the policy, in an action to recover the amount of premiums paid, *Held*, that the transaction between the plaintiff and R. constituted a fraud upon the defendants, to which the plaintiff was a party in contemplation of law, and that the defendants could take advantage of the fraud as well against him as against R., although the plaintiff did not actually participate in the fraudulent intent.

Held, that the mere relationship between the plaintiff and L. was not such an interest as would support the policy, but that the policy was *primâ facie* valid, and could only be avoided by showing by parol evidence such want of interest, and that the plaintiff was now estopped from averring such want of interest against the defendants.

Held, that the responsibility assumed by the defendants, and the risk and inconvenience to which they were exposed by the acts of the plaintiff, constituted a consideration for the premiums paid. *Lewis* v. *Phœnix Mut. Life Ins. Co.*, Ins. L. J., February, 1874.

See LIFE INSURANCE.

JUDICIARY ACT.

1. CIRCUIT COURT. — Original cognizance of all suits of a civil nature, at common law or in equity, is vested in the circuit courts by the eleventh section of the judiciary act, concurrent with the courts of the several states, subject to certain limitations, conditions, and restrictions. *Grover & Baker Sewing Machine Co.* v. *Florence Sewing Machine Co.*, Leg. Gazette, March 27, 1874.

2. CONDITIONS OF COGNIZANCE OF SUITS. — Those conditions, applicable to the present case, are that the matter in dispute shall exceed, exclusive of costs, the sum or value of five hundred dollars, and that an alien is a party, or that the suit is between a citizen of the state where the suit is brought and a citizen of another state. *Ib.*

3. WHEN CIRCUIT COURT HAS JURISDICTION. — Where the matter in dispute does not exceed, exclusive of costs, the sum or value of five hundred dollars, the circuit courts have no jurisdiction, except in revenue and patent cases; and the restriction applicable to all cases is that no civil suit shall be brought before any circuit court against any inhabitant of the United States by any original process in any other district than that

whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. *Ib.*

4. SUITS, whether at law or in equity, when *commenced in a state court against an alien*, or by a citizen of the state in which the suit is brought against a citizen of another state, may, under the twelfth section of the same act, be removed by the defendant for trial into the next circuit court for the same district, provided the defendant file a petition requesting such removal at the time of entering his appearance in the state court, and comply with all the other conditions specified in the section. *Ib.*

5. CONDITION FOR REMOVAL. — By the true construction of that section, it is required, in order that the right to effect the removal may arise, that each distinct interest should be represented by persons all of whom are entitled to sue, or such as may be sued in the federal courts; the established rule being that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or be liable to be sued in the court to which the suit is removed. *Ib.*

6. JURISDICTION OF CIRCUIT COURTS DEPENDS ON ACT OF CONGRESS. — Circuit courts do not derive their judicial powers immediately from the Constitution; consequently the jurisdiction of such courts, in every case, must depend upon some act of Congress, as the Constitution provides that the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish. *Ib.*

7. JURISDICTION OF COURTS CREATED BY STATUTE. — Courts created by statute can have no jurisdiction in controversies between party and party, except such as the statute confers. *Ib.*

8. DIFFERENT REGULATIONS ENACTED SUBSEQUENT TO THE JUDICIARY ACT. — Different regulations are enacted in the subsequent act for the removal of causes in certain cases from the state courts; but this act, like the judiciary act, limits the right of removal to the alien defendant and to the defendant who is a citizen of a state other than that in which the suit is brought. *Ib.*

9. PETITION FOR REMOVAL OF SUITS FROM STATE COURT. — None but the alien defendant or the non-resident defendant have any right under that act to petition for the removal of the case; but the provision is that such a defendant may, at any time before the final hearing of the cause, remove the same from the state court into the circuit court for trial, subject to the conditions therein expressed, even though it appears that a citizen of the state where the suit is brought is also a defendant, if (1) the suit, so far as it relates to the alien defendant or the non-resident defendant, was instituted and is prosecuted for the purpose of restraining or enjoining such defendant; or (2) if the suit is one which, so far as it respects such alien or non-resident defendant, can be finally determined without the presence of the other defendant or defendants as parties in the cause. *Ib.*

10. THE REMOVAL OF CAUSE DOES NOT TAKE AWAY PLAINTIFF'S RIGHT TO PROCEED AGAINST OTHER DEFENDANTS AT THE SAME TIME IN STATE COURT. — Cases can only be removed under that act, however, subject to the fundamental condition, that the removal of the cause shall not be deemed to prejudice or take away the right of the plaintiff to pro-

ceed at the same time with the suit in the state court, if he shall see fit, against the other defendants. *Ib.*

11. INTERPRETATION. — Nothing can be inferred from that act to support the theory assumed by the defendants, as the material phrase of the act is the same as the language employed in the judiciary act; and the construction must be controlled by the rule that words and phrases, the meaning of which have been ascertained by judicial interpretation, are, when used in a subsequent statute, to be understood in the same sense. *Ib.*

12. THE RIGHT OF REMOVAL OF CAUSES FROM STATE COURTS EXTENDED BY AMENDMENT. — Congress amended that act on the 2d of March, 1867, and extended the right of removal in such a case to the citizen of another state, whether he be plaintiff or defendant, in a suit commenced or pending in a state court, in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state. *Ib.*

13. ALIENS are not included in the new enactment at all, and the conditions applicable to the non-resident party, whether plaintiff or defendant, are that the petitioner must file in the state court an affidavit, stating that he has reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in such state court; and the act provides that if he will file such affidavit and comply with all the other specified conditions, he may, at any time *before the final hearing or trial of the suit*, apply to the state court for the removal of the suit into the next circuit court to be held in the district, and that it shall be the duty of the state court to proceed no further in the suit. *Ib.*

14. RIGHT OF REMOVAL FROM STATE COURTS EXTENDS TO NON-RESIDENT PLAINTIFF AS WELL AS TO NON-RESIDENT DEFENDANT. — Appropriate language to show that the law-makers intended to vest in the non-resident party, whether plaintiff or defendant, the right to remove the suit into the circuit court in a case where a citizen of the state in which the suit is brought is joined in the suit with the petitioner is wholly wanting; nor is it competent for the court to supply the deficiency by construction, as it is obviously the main purpose of the act to extend the right of removal to the non-resident plaintiff as well as to the non-resident defendant.

Words to express any such purpose are entirely wanting, the language employed being that a pending suit, or one hereafter brought, in a state court, "*in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state*," . . . . whether he be plaintiff or defendant, "*such citizen of another state*" may remove the same into the circuit court.

Instead of that, the language of the judiciary act is: If a suit is commenced in a state court "*by a citizen of the state in which the suit is brought against a citizen of another state*," *the defendant* may remove the suit into the circuit court, if he file his petition at the time he enters his appearance in the state court.

Beyond doubt, the phraseology of the two provisions is different, but they mean the same thing in respect to the party who may effect the removal, except that the last act extends the privilege to the non-resident plaintiff as well as to the non-resident defendant; but all of the plaintiffs or all of the defendants, as the case may be, must be non-residents, and must join in the petition for the removal of the suit. *Ib.*

LANDLORD AND TENANT.

AN AGREEMENT FOR STIPULATED PRICE PER MONTH IS NOT A LEASE. — An agreement permitting, for a stipulated price per month, the use on a portion of a public wharf of certain described utensils for loading and unloading, is not a leasing of the premises on which these conveniences are placed, and does not create the relation of landlord and tenant, under which the tenant could be dispossessed as holding over after expiration of lease. *Daniels* v. *Cushman*, Daily Reg., April 1, 1874.

LEASE.

NOTICE TO QUIT. — A lessor retains sufficient interest in the premises leased, after the conveyance of the premises to a third party, to entitle him to give the necessary notice to the tenant to quit. *Glenn* v. *Thompson*, Leg. Gazette, April 3, 1874.

See SURETY, 1.

LEGISLATURE.

1. THE POWER TO DO A SPECIFIC ACT conferred by the legislature is exhausted when that act is performed. *Smith* v. *The Mayor, &c. of New York*, Daily Reg., March 26, 1874.

2. AUTHORITY TO INCREASE PAY OF AN OFFICER. — A reference in an act of the legislature to a fact does not render valid the authority under which that fact had come into existence. The authority to increase the pay of an official cannot be established by implication of law; it must be by direct and positive enactment. *Ib.*

3. APPROPRIATION OF MONEY FOR PAYMENT OF SALARIES. — The fact that an appropriation of money made by the legislature for the payment of the salaries of certain officials is sufficiently large to cover the sum claimed by one of them is no authority for its payment. *Ib.*

LIFE INSURANCE.

1. AGENT. — Colton, not being a regular agent of the defendant, procured an application for insurance on the life of the deceased, and the policy was made out and delivered to him with instructions not to deliver it to the insured till the premium was paid. Disregarding instructions, he delivered the policy and received the premium some nine days afterward, when the health of the insured was materially changed for the worse. *Held*, that prior to the execution of the policy, Colton was not an agent of the defendant, although he may have professed so to act.

Held, that upon the execution and delivery of the policy to him he became a special agent of the company to receive the premiums and deliver the policy on such receipt.

Held, that assuming that the representations in the application are true, if the De Camps were made acquainted on June 5 or 6 with the terms of the policy, and if they paid the premium on the 14th to Colton, that thereupon it became a perfected and binding policy, notwithstanding that Colton never paid the premium to the defendant.

Held, that if any material change in the health of the insured takes place before the contract is consummated, it is the duty of the parties to inform the company of these facts.

Held, that if the policy was executed by the defendant, and handed to Colton to be delivered to the applicants on the receipt of the premium, and that they became acquainted with the contents on the 5th or 6th of June, and assented thereto and promised to pay the premium in a few days, that the contract then became consummated, subject only to the payment of the premium, and that it was not obligatory upon the plaintiff to inform the defendant of any change in the health of the insured, if any, taking place between the 5th and the 14th of the month.

Held, that the fact of the delivery of the policy on the 5th of June was immaterial, except that it is important for the plaintiff to show that she acquiesced in the terms of the contract prior to any supposed change in the health of the insured, and that there was an assent on the part of the plaintiff and defendant in the terms of the policy.

Held, that if naught remained but the payment of the premium, it is unimportant who had possession of the policy between the 5th and 14th of June; but if the payment of premium and receipt of the policy were a part of a collusive scheme between the plaintiff and Colton, whereby she got possession of the policy, the plaintiff cannot recover.

Held, that if the questions in the application were not rightfully answered by the applicant, the representations which he made were untrue, and if untrue in this material respect, the company did not have an honest statement of the risk they were called upon to insure, and therefore the policy is avoided.

Held, that in cases where the construction of the language of the policy is doubtful, it is to be construed against the company, but where the meaning is plain, this rule is not so important.

Held, that the plaintiff is not concluded by the physician's certificate as to the cause of death, nor by the verdict of the coroner's jury. *De Camp* v. *N. J. Mut. Life Ins. Co.*, Ins. L. J., February, 1874.

2. SUICIDE. — *Held*, that to make the insurer liable, the mind of the deceased must have been so far deranged that he was incapable of using a rational judgment in regard to the act of self-destruction. *Coverston* v. *Conn. Mut. Life Ins. Co.*, Ins. L. J., February, 1874.

3. SUICIDE BY INSANE IMPULSE. — *Held*, that if the insured was impelled by an insane impulse which his remaining reason did not enable him to resist, or if his reasoning powers were so far overthrown that he was unable to exercise them on the act he was about to perform, the company is liable. *Ib.*

4. *Held*, that there is NO PRESUMPTION OF LAW THAT SELF-DESTRUCTION ARISES FROM INSANITY; and if, by reason of sickness, or distress of mind, or a desire to provide for his family, the insured takes his own life in the exercise of his usual reasoning faculties, the company is not liable. *Ib.*

5. *Held*, that the BURDEN OF PROOF lies upon the company to show that the death was caused by suicide and not by accident. *Ib.*

LIMITATIONS.

1. STATUTES OF THE SEVERAL STATES. — The statutes of limitations of the several states are not binding upon the rights of the United States. *Gardiner* v. *Miller*, Pac. Law Rep., March 17, 1874.

2. LEGAL TITLE TO UNDEFINED MEXICAN GRANT. — The legal title to a quantity of land granted by Mexico with undefined boundaries, to be located within designated exterior boundaries, remains in the United States until the patent to a particular tract is issued. *Ib.*

3. STATUTES OF LIMITATIONS NOT APPLICABLE ANTERIOR TO PATENT. — The statute of limitations of California has no application to the title of a patentee of the United States anterior to the issuance of the patent. *Ib.*

MISDEMEANOR.

1. DEFINITION OF. — A misdemeanor is an act or omission for which a punishment other than death or imprisonment in the state prison is denounced by law. The breach of a city ordinance, as against drunkenness, is not a misdemeanor. *Pillsbury* v. *Brown*, Pac. Law Rep., March 10, 1874.

2. DISTRICT ATTORNEY. — The statute of 1869–70, providing fees of district attorney upon convictions for misdemeanors, referred only to misdemeanors defined as such by the general public law of the state. *Ib.*

MORTGAGE.

See INSURANCE, 1.

PARTNERSHIP.

1. LIMITED PARTNERSHIP. — When there has been a substantial conformity with the law which authorizes the formation of limited partnerships, the court will hold the statutory proceedings to be valid. *Levey* v. *Lock*, Daily Reg., March 28, 1874.

2. PUBLICATION AND RECORDING OF TERMS OF PARTNERSHIP. — These proceedings having been published and recorded previous to the transactions involved in the suit; *held*, that notice was given plaintiff of the fact that defendant was a special partner sufficient to put him on his guard. *Ib.*

PATENT LAW.

1. USE OF PART OF COMBINATION. — A combination of three distinct parts is not infringed by the making and sale of two of the parts to be used without the third. *Cooledge* v. *McCone*, Pac. Law Rep., March 17, 1874.

2. USELESS PARTS REJECTED. — When the invention claimed and patented is a combination of three distinct parts, it is no infringement to make and use two of the parts, even though the third is useless. *Ib.*

PLEADING AND PRACTICE.

1. NOTICE OF ARGUMENT ON MOTION FOR NEW TRIAL. — Under the old practice act either party could notice for argument a motion for a new trial, and if the party opposing the motion neglected to bring it on, he waived his objection to any delay. *Griffith* v. *Gruner*, Pac. Law Rep., March 3, 1874.

2. NOTICE TO PARTY APPEARING BY ATTORNEY. — Under the practice act, where a party appears in an action by attorney, a notice to take depositions must be served on the attorney and not on the party personally. *Ib.*

3. OBJECTION TO EVIDENCE. — Objection to the form in which evidence is offered must be first taken in the trial court. *Gill* v. *O'Connell*, Pac. Law Rep., March 10, 1874.

4. CERTIORARI. — If the president judge certifies, in answer to a *certiorari* suggesting diminution of the record, that all has been fully and perfectly returned, the *certiorari* has performed its office, and the only remedy is an action against the judge for a false return. *Flagg* v. *Searle*, Leg. Int., March 27, 1874.

5. DEPOSITIONS. — Defendant may be compelled, on application of plaintiff, to file the depositions taken on his behalf on payment by plaintiff of the costs for taking the depositions. *Martin* v. *Dearie*, Leg. Int., April 3, 1874.

6. ROAD JURORS should be sworn in the manner required by the act of assembly. *In re Cambria Street*, Leg. Int., April 3, 1874.

7. WHEN TO BE SWORN. — All the jurors should be sworn before they enter on their duties. *Ib.*

8. AMENDMENT. — An amendment made by the court cannot cure radical defects in the proceedings of the jury. *Ib.*

9. CONSTRUCTION OF STATUTE. — *Held*, that a later statute which is general and affirmative does not abrogate a former which is particular, unless negative words are used, or unless the two acts are irreconcilably inconsistent. *City of St. Louis* v. *Life Association of America*, Ins. L. J., February, 1874.

10. REMOVAL OF ACTION FROM STATE COURT INTO CIRCUIT COURT OF UNITED STATES. — An action cannot be removed from a state court into the circuit court of the United States under the act of Congress of 1867, c. 196, after a trial on the merits, although such trial has resulted in a disagreement of the jury. *Galpin* v. *Critchlow*, Am. Law Reg., February, 1874.

See CONSTITUTIONAL LAW; JUDICIARY ACT.

PRACTICE.

See PLEADING AND PRACTICE.

PREËMPTION.

VOID CONTRACT. — An executory contract, made by one claiming the benefits of a preëmption law of 1841, before making proof and payment as a preëmptor, to convey land upon receipt of a patent from the United States, cannot be enforced. *Hutson* v. *Walker*, Pac. Law Rep., March 10, 1874.

RAILROADS.

1. CHARTER. — An act prohibiting a railroad company from charging at a greater rate per mile for carriage of passengers or freight from place to place within a state, than for similar carriage through or beyond the state, no such power to regulate charges having been reserved in the char-

ter, is unconstitutional and void. *Phila. &c. R. R. Co.* v. *Bower*, Am. Law Reg., March, 1874.

2. Such an act is not within the *police power of the state*. The legislature may regulate the exercise of the corporate franchise by general laws passed in good faith for the legitimate ends of the police power, that is, for the peace, good order, health, comfort and welfare of society; but it cannot, under color of such laws, destroy or impair the franchise itself, nor any of those rights or powers which are essential to its beneficial exercise. *Ib.*

See COMMON CARRIERS.

REAL PROPERTY.

See STATUTE OF FRAUDS.

SEIZURE.

CUSTOM LAWS. — Where dutiable merchandise was imported as passengers' baggage, but no attempts were made by the owners and consignees to have it passed as such; and the owner, without knowledge of the seizure by the officers of customs, offered the goods, with correct bills of lading and moneys, for entry at the custom-house. *Held*, that such goods were not forfeitable either under the 50th section of the act of March 2, 1799; the 1st section of March 3, 1863; or the 4th section of July 18, 1866. *The United States* v. *Ninety-five Boxes, containing, &c.*, Int. Rev. Rec., March 28, 1874.

STATUTE OF FRAUDS.

A PAROL AGREEMENT TO PURCHASE REAL ESTATE is of no effect. A part payment without possession, and which was afterwards appropriated to another indebtedness, will not take it out of the statute of frauds. *Newkumet* v. *Kraft*, Leg. Int., April 3, 1874.

SURETY.

LEASE. — A was surety on a lease renewable from year to year, and having given sixth months' notice that he would not continue surety after the end of the current year; *held*, that he having died in the mean time, his estate was not liable for any rent in arrear after that date. *In re Estate of De Silver*, Leg. Chron., March 28, 1874.

TRADE-MARK.

1. FAMILY NAME. — A manufacturing company will be protected in the use of a certain trade-mark, though part of the trade-mark consists of a family name. *Meriden Britannia Co.* v. *Parker*, Am. Law Reg., March, 1874.

2. Equity will restrain the use of the same name in so far as it forms a material part of the trade-mark, and will necessarily injure the company, even though another may acquire the right of that name from parties to whom it legitimately belongs.

It is not every use of the name, however, that will be held to necessarily infringe the trade-mark, or that will be restrained by injunction. *Ib.*

3. Though equity will not protect a trade-mark which deceives the pub-

lic, it is not every erroneous impression which may be drawn from the use of a trade-mark that will be sufficient to destroy its validity. *Ib.*

4. The employment of a family name as a component part of a trade-mark is no fraud upon the public, though the family does not actually make the articles bearing the name, provided they are the result of their skill and experience. *Ib.*

5. INFRINGEMENT OF TRADE-MARK. — The complainant, a company engaged in manufacturing plated forks and spoons, acquired the right to the use of the trade-mark — "1847 Rogers Bros. A. 1." — subsequently the respondent, by an arrangement with three brothers named Rogers, manufactured plated spoons marked "C. Rogers Bros. A. 1." *Held*, that this was an infringement of complainant's trade-mark, and that the use of the term "Rogers Bros." should be restrained. *Ib.*

TRADING WITH THE ENEMY.

See WAR.

WAR.

TRADING WITH THE ENEMY. — In February, 1862, while the whole State of Louisiana, including the city of New Orleans, was under the civil and military control of the rebels of the late rebellion, a mercantile firm in New Orleans sent their agent into certain interior parishes of the State to collect money due to the firm, and to make purchases of cotton. After the agent had got into the interior parishes, but before he had bought any cotton, the city of New Orleans, where his principals were, was captured (April 27th, 1862) by the forces of the United States, and remained from that time under the control of the government, the interior parishes, however, still remaining in the control of the rebels. Subsequently to this the agent made purchases of cotton from persons in these interior parishes, still, as just said, under the control of the rebels. *Held*, that he was guilty of trading with the enemy, and that the property was rightfully taken by the federal government. *United States* v. *Lapene*, Leg. Gazette, March 27, 1874.

SIR FLETCHER NORTON was noted for his want of courtesy. When pleading before Lord Mansfield on some question of manorial right, he chanced unfortunately to say, "My lord, I can illustrate the point in an instance in my own person; I myself have two little manors." The judge immediately interposed with one of his blandest smiles, "We all know it, Sir Fletcher."

CHIEF JUSTICE KENYON was curiously economical about the adornment of his head. It was observed for a number of years before he died that he had two hats and two wigs. Of the hats and the wigs, one was dreadfully old and shabby, the other comparatively spruce. He always carried into court with him the very old hat and the comparatively spruce wig, or the very old wig and the comparatively spruce hat. On the days of the

very old hat and the comparatively spruce wig, he shoved his hat under the bench and displayed his wig; but on the days of the very old wig and the comparatively spruce hat, he always continued covered.

AT a dinner of a Law Society, the president called upon the senior solicitor of the company to toast the person whom he considered the best friend of the profession. "Then," responded he, "the man who makes his own will."

LORD NORTHINGTON was one of the "swearing Chancellors." When his lordship was chosen a governor of St. Bartholomew's Hospital, a smart gentleman, who was sent with the staff, carried it in the evening, when the chancellor happened to be drunk. "Well, Mr. Bartlemy," said his lordship, snuffing, "what have you to say?" The man, who had prepared a formal harangue, was transported to have so fair an opportunity given him for uttering it, and with much dapper gesticulation congratulated his lordship on his health, and the nation on enjoying such great abilities. The chancellor stopped him short, saying, "By God, it is a lie! I have neither health nor abilities; my bad health has destroyed my abilities." In his last illness he was recommended to avail himself of the services of a certain prelate. "He will never do," said the chancellor; "I should have to acknowledge that one of my heaviest sins was in having made him a bishop!"

Lady Northington, who was an ignorant woman, told George III. at a drawing-room, that their country house was built by *Indigo* Jones. To this the king replied that he "thought so by the style." When her ladyship related this conversation to Lord Northington, the latter remarked, to her surprise, that he could not well tell which was the greater fool, she or his majesty.

BY the laws of England, the lord chancellor is held to be the guardian of the persons and property of all such individuals as are said to be no longer of sound mind and good disposing memory, — in fine, to have lost their senses. Lord Chancellor Loughborough once ordered to be brought to him a man against whom his heirs wished to take out a statute of lunacy. He examined him very attentively, and put various questions to him, to all of which he made the most pertinent and apposite answers. "This man mad!" thought he; "verily, he is one of the ablest men I ever met with." Towards the end of his examination, however, a little scrap of paper, torn from a letter, was put into Lord Loughborough's hand, on which was written, "Ezekiel." This was enough for such a shrewd man as the chancellor, who forthwith took his cue. "What fine poetry," said his lordship, "is in Isaiah!" "Very fine," replied the man, "especially when read in the original Hebrew." "And how well Jeremiah wrote!" "Surely," said the man. "What a genius too was Ezekiel!" "Do you like him?" said the man; "I'll tell you a secret — *I am Ezekiel!*"

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ABBREVIATIONS.

Albany L. J. ..... *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & Co.
Am. Law Rec. ..... *American Law Record*, Cincinnati, O., H. M. MOOS.
Cent. L. J. ..... *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.
Chicago L. N. ..... *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.
Daily Reg. ..... *Daily Register*, New York, 303 BROADWAY, N. Y.
Ins. L. J. ..... *Insurance Law Journal*, New York, C. C. HINE, 176 BROADWAY.
Int. Rev. Rec. ..... *Internal Revenue Record*, New York, W. C. & F. P. CHURCH.
Leg. Chron. ..... *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
Leg. Gazette ..... *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.
Leg. Int. ..... *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
Pac. Law Rep. ..... *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
Pittsb. L. J. ..... *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.

ADMINISTRATORS.

See PATENT, 6.

ADMIRALTY.

1. SALVAGE SERVICES BY WRECKING COMPANY. — Where salvage services were rendered by the agents of a wrecking company in pursuance of a contract with the company; *held*, that the vessel and her cargo were not liable. *Baker & Co.* v. *The Tros*, Leg. Gazette, April 17, 1874; Leg. Int., April 24, 1874.

2. COLLISION AND TOTAL LOSS. — Where there is a total loss by reason of collision the party in fault is liable for the full value of the lost ship. *Bodine, &c.* v. *The Falcon, &c.*, Leg. Int., April 24, 1874; Pittsb. L. J., May 6, 1874.

8. DEMURRAGE. — PREOCCUPATION OF WHARF. — Where a charter party contained a stipulation that the vessel should be unloaded "as fast as the custom of the port will admit," and the vessel was delayed by reason of the preoccupation of the specified wharf, it was held that the charterer was liable for demurrage. *Fulterer* v. *Abenheim*, Leg. Int., April 24, 1874.

4. CONTRACT WHILE SHIP WAS IN CUSTODY OF THE LAW. — The fact that a contract, under which a lien is claimed, was entered into while the ship was in the custody of the law is no bar to a libel *in rem*, to enforce the lien against the vessel in the hands of the owner, to whom she has been restored. *Edmonds* v. *The Witch Queen*, Pac. Law. Rep., April 7, 1874.

5. CONSTRUCTION OF SHIPPING ACT OF 1872. — THE 13TH SECTION of the act of June 7, 1872 (17 Statutes at Large, 262), has reference only to agreements specified in the preceding section.

THE 2D CLAUSE OF THE 14TH SECTION refers only to seamen who have signed agreements in pursuance of section 12.

SECTION 8 authorizes a master or owner to be his own shipping commissioner, and is not controlled by sections 13 and 14. *The Grace Lathrop*, Cent. L. J., April 16, 1874.

6. CONSTRUCTION OF SHIPPING ACT OF 1872. — Under the act of June 7, 1872 (17 Statutes at Large, 262), a ship cannot proceed upon a voyage without an agreement, written or printed, with her seamen. *U. S.* v. *City of Mexico*, Ib.

7. CONSTRUCTION OF AMENDATORY SHIPPING ACT OF 1873. — The amendatory act of January 15, 1873 (17 Statutes at Large, 410), does not repeal the requirements of the act of '72, touching written or printed agreements with seamen, further than to exempt the voyages included in the act of '73 from the operation of section 12 of the act of the preceding year. *Ib.*

AGENCY.

See MALICIOUS PROSECUTION; NEGLIGENCE, 1.

APPEAL.

See MINISTERIAL OFFICER, 1.

ATTORNEY.

See BANKRUPTCY, 7.

BAIL.

FROM ANOTHER STATE MAY TAKE HIS PRINCIPAL IN PENNSYLVANIA. — It is well settled that bail from another state may arrest his principal in Pennsylvania, upon a bail piece, or depute another to do it, and take him out of the State, for the purpose of surrendering him in discharge of his recognizance; and the act of 1842, abolishing imprisonment for debt, does not operate to prevent the arrest. *Mason's Petition*, Leg. Chron., April 11, 1874.

BANKRUPTCY.

1. MUTUAL DEBTS AND CREDITS DEFINED. — *Held*, where A was one of the joint makers of a promissory note held by a bankrupt corporation, and was, also, a partner of a firm having a claim against such corporation, that there was no mutual debt or credit within the meaning of the bankrupt act, and could be no set-off. *Gray* v. *Rollo*, Leg. Gazette, May 1, 1874; Am. Law Rec., May, 1874.

2. REVIVAL BY NEW PROMISE. — *Held*, That to revive a discharged debt the promise to pay must be clear, distinct, and unequivocal; and that the words "Be satisfied; I intend to do right; all will be right betwixt my just creditors and myself," were insufficient. *Allen & Co.* v. *Ferguson*, Leg. Gazette, April 24, 1874.

3. RECORD CONTAINING EXCLUDED DEPOSITIONS GIVEN TO JURY. — A record in bankruptcy may be given to a jury notwithstanding the fact that it contains depositions that were not permitted to be read. *Shomo* v. *Zeigler*, Leg. Chron., April 18, 1874.

4. FRAUDULENT PREFERENCE. — WILSON *v.* BANK OF ST. PAUL, 1 AM. L. T. R. 1, DISTINGUISHED. — Where a preference is given and the intent to prefer is manifested by affirmative acts, the rule of *Wilson* v. *Bank of St. Paul* does not apply. *Hyde* v. *Corrigan*, Pac. Law Rep., April 21, 1874.

5. RIGHTS OF EXECUTION CREDITOR. — An execution creditor, without leave of the bankrupt court, has no right to sell under his writ after the filing of a petition in bankruptcy against the debtor; and a sale so made passes no title. He may assert his lien in the bankrupt court, but cannot control the property as against the assignee. *Turner* v. *The Skylark*, Chicago L. N., April 18, 1874.

6. POWER OF STATE TO RECOVER TAXES NOT AFFECTED BY PROCEEDINGS. — The property of a bankrupt cannot be sold by an assignee so as to divest the right of the state in which it is located to enforce payment of her taxes. *Stokes* v. *State of Georgia*, Chicago L. N., April 18, 1874.

7. EMPLOYMENT OF ATTORNEY BY ASSIGNEE. — Where an attorney is employed by an assignee, the bill of the attorney can only be settled as part of the assignee's accounts as provided by sec. 27 of the bankruptcy act. *In re Hubbel & Chapel*, Leg. Gazette, May 8, 1874.

COMMISSIONER OF GENERAL LAND OFFICE.

See JURISDICTION, 1.

COMMON CARRIER.

A COMMON CARRIER MAY LIMIT ITS COMMON LAW LIABILITY BY SPECIAL CONTRACT, and such contract may be made by means of a receipt. Ordinarily the shipper will be presumed to know the contents of a receipt; and, especially, if he is familiar with the carrier's manner of doing business. A receipt was given to a shipper as follows: "It is further agreed, and is part of the consideration of this contract, that the Adams Express Company are not to be held liable or responsible for the property herein mentioned for any loss or damage arising from the damages of railroad, steam, or river navigation, leakage, fire, or from the acts

of God or of the enemies of the government, mobs, riots, insurrections, pirates, or from any of the damages incident to a time of war, unless specially insured by them and so specified in this receipt, which insurance shall constitute the limit of the liability of the Adams Express Company in any event." A portion of the goods were lost by robbery. *Held*, that the contract released the carrier. *Olwell* v. *Adams Exp. Co.*, Cent. L. J., April 16, 1874.

CONSTABLE.

See MINISTERIAL OFFICER, 1.

CONSTITUTIONAL LAW.

1. A STATUTE ALLOWING WRITS TO BE AMENDED by striking out the names of some of the plaintiffs cannot be constitutionally applied to suits pending at the time of its passage. *Kent* v. *Gray*, Leg. Gazette, April 17, 1874; Chicago L. N., April 18, 1874.

2. SECTION 2 OF THE ACT OF MARCH 2, 1867, NOT UNCONSTITUTIONAL. — Section 2 of the act of March 2, 1867, touching searches and seizures in connection with the revenue, is not in conflict with the fourth and fifth amendments of the Constitution. *In re Platt*, Int. Rev. Rec., April 25, 1874.

3. DISPOSITION OF PROPERTY OF INFANT BY LEGISLATURE. — *Held*, that an act of the Legislature of California authorizing a sale of the property of an infant was repugnant to the third article of the constitution of said State, the disposition of such property being clearly within the province of the judiciary. *Paty* v. *Smith*, Pac. Law Rep., April 14, 1874.

CONTRACT.

1. CHANGE OF CONDITION AS TO A BUILDING. — A contracted to make a deed to a lot of ground upon the erection of a building thereon and its operation as a foundry, and the payment of $50 by B. The building was erected and operated by B as a foundry, but was subsequently sold to C, who used it as a mill. *Held*, that, upon the payment of the specified sum, C was entitled to a deed. *Plymouth Man. Co.'s App.*, Leg. Chron., May 2, 1874.

2. "PUT" CONTRACTS VOID ON THE GROUND OF PUBLIC POLICY. — A "put" contract in the following words: "Received of E. F. $50, in consideration of which we give him, or the holder of this contract, the privilege of delivering to us or not, prior to 3 o'clock P. M., of June 30, 1872, by notification or delivery, 10,000 bushels No 2 oats, regular receipts, at 41 cents per bushel, in store; and, if delivered, we agree to receive and pay for the same at the above price," — *held* to be contrary to public policy and void. *In re Chandler, Pomeroy & Co.*, Chicago L. N., April 11, 1874.

3. EXPRESS COMPANY MAY LIMIT ITS LIABILITY BY CLASSIFICATION OF PACKAGES. — A condition imposed by an express company limiting its liability to fifty dollars, except where the value of the package is given, is reasonable and valid. *Oppenheimer* v. *U. S. Exp. Co.*, Chicago L. N., April 25, 1874.

See ADMIRALTY, 1, 3, 5; COMMON CARRIER; INSURANCE, 5; MUNICIPAL CORPORATION, 2; TAXATION, 2.

CORPORATION.

VERIFICATION OF RECORD OF, EXERCISING MUNICIPAL POWERS. — The general rule, that public documents required by law to be executed by a public officer must be verified by the official signature of the officer making it, does not extend to the proof of the records of a corporate board exercising municipal and *quasi* legislative powers. *People* v. *Eureka, &c. Canal Co.*, Pac. Law Rep., April 28, 1874.

See MALICIOUS PROSECUTION; MUNICIPAL CORPORATION.

CUSTOMS.

1. HOW INCORRECTNESS MUST BE ESTABLISHED BY IMPORTER. — The only way in which an importer can question or show the incorrectness of the rate and amount of duties ascertained by the collector is to protest, appeal, pay the duties as ascertained by the collector, and sue to recover the duties so paid, as prescribed by section 14 of act of June 30, 1864.

In an action brought by the government for duties, the ascertainment and liquidation of duties by the collector is final and conclusive, and cannot be questioned by the importer in any other way. *U. S.* v. *Cousinery*, Int. Rev. Rec., April 18, 1874.

2. IN A SUIT ON A WAREHOUSE CUSTOM BOND brought by the United States, it is not necessary that notice of liquidation be given to the importer.

When such bond has become forfeited, it can be satisfied only by paying the whole amount of the duties due on the goods it covers. *Fletcher et al.* v. *U. S.*, Int. Rev. Rec., May 4, 1874.

DIRECTION TO JURY.

FAILURE TO DISTINGUISH LAW AND FACT, ERROR. — It is error for a court to give the jury direction to bring in a verdict for "such damages for the breach of the contract as you may find on the testimony" that the plaintiff is entitled to, inasmuch as it involves a confusion of law and fact and leaves the jury to adopt any rule they may elect. *Schofield* v. *Simpson*, Leg. Chron., April 11, 1874.

DIVORCE.

See PLEADING AND PRACTICE, 5.

EASEMENT.

MERGER OF, BY UNITY OF TITLE. — An easement will survive a unity of title if it remains undisturbed, and will be revived by a severance of title. *Hurlburt* v. *Firth*, Leg. Int., May 1, 1874.

ESTOPPEL.

1. THE DOCTRINE OF ESTOPPEL IN PAIS held to apply only where the declaration had the effect of misleading, and was calculated and intended to mislead.

Where, in an insurance case, the plaintiff set forth in his proofs of loss

that he had other insurance upon the property, and it did not appear that any tenable defence had the go-by on account of such statement, it was held that plaintiff was not estopped to show the contrary. *McMaster* v. *Ins. Co. of No. America*, Ins. L. J., April, 1874.

2. BY JUDGMENT. — A valid judgment for the plaintiff sweeps away every defence that should have been raised against the action; and this too for the purpose of every subsequent suit, whether founded on the same or a different cause. Nor will equity relieve the defendant from a judgment on any ground of which he should have availed himself in the action at law. *Kelly* v. *Doulin*, Chicago L. N., May 2, 1874.

EVIDENCE.

1. STATEMENTS MADE OUT OF COURT by a witness contrary to those made upon the stand are admissible to impeach his credit. *Schlater* v. *Winpenny*, Leg. Gazette, May 1, 1874.

2. SECONDARY EVIDENCE AS TO MORTGAGE. — The original mortgage being lost, secondary evidence to show who was the mortgagee is competent. *Atherton* v. *Phœnix Ins. Co.*, Ins. L. J., April, 1874.

3. BLANK POLICY OF INSURANCE OF OUTSIDE COMPANY. — A blank policy of insurance of a company not a party to the suit is admissible, in case of mistake, to show what privileges would have been granted had the policy in suit been correctly written. *Van Tuyl* v. *Westchester Fire Ins. Co.*, Ins. L. J., April, 1874.

See BANKRUPTCY, 8; INSURANCE, 6; LEX LOCI.

HABITAT.

See JURISDICTION, 3; LEX LOCI.

HOMESTEAD EXEMPTION.

THE HOMESTEAD LAW OF SOUTH CAROLINA held not to affect debts which were contracted prior to its passage. *Cochran* v. *Darcy*, Chicago L. N., April 11, 1874.

INFANT.

See CONSTITUTIONAL LAW, 8.

INSURANCE.

1. KEEPING INHIBITED ARTICLE FOR MEDICINAL PURPOSE. — The policy contained a provision that no petroleum should be "kept or used" upon the premises. Plaintiff kept a jug of petroleum for medicinal purposes. *Held*, that there was no infraction of the policy. *Williams* v. *Mech. & Tr. Ins. Co.*, Ins. L. J., April, 1874.

2. MORTGAGE. — ASSIGNMENT OF POLICY. — A policy contained the following clause: "It is agreed that this insurance shall be void in case this policy, or the interest insured thereby, shall be sold, assigned, transferred, or pledged without the previous consent in writing of the insurers." An agent in charge of a ship to which the policy related mortgaged her, to secure a debt for repairs, which appeared to be necessary and done in

good faith: *Held*, that the mortgage was valid. *Atherton* v. *Phœnix Ins. Co.*, Ins. L. J., April, 1874.

8. CONSTRUCTION OF "IMMEDIATE NOTICE" IN ACCIDENT POLICY. — An accident policy provided that "immediate notice" should be given to insurer. *Held*, that an agent of insurer being in the vicinity, notice after the lapse of six days was not a compliance with the terms of the policy. *Railway Passenger Ins. Co.* v. *Burwell*, Ins. L. J., April, 1874.

4. INSURER RESPONSIBLE FOR DELIVERY OF NOTICE. — That an ineffectual attempt to give notice required by the terms of an accident policy is of no avail. The insured is responsible for the delivery of the notice. *Ib.*

5. AN ORAL AGREEMENT TO ADD TO OR TAKE FROM the amounts covered by a policy made at the same time as a verbal contract of insurance is to be regarded as a mere executory agreement, and cannot have the effect to thwart or countervail the contract of insurance as such. *Strohn* v. *Hartford Fire Ins. Co.*, Ins. L. J., April, 1874.

6. THE WORDS "HELD IN STORE" may be explained by extrinsic evidence, and construed to embrace other property kept in a warehouse than that owned by the insured. *Ib.*

7. PROXIMATE AND REMOTE CAUSE. — ICE. — A policy upon a canal boat exempted insurer from injuries by ice, the boat to be moored to insurer's satisfaction. The boat being frozen at her moorings, an overflow of water took place, by reason of an accumulation of ice, and the boat was wrenched and injured. *Held*, that ice was not the proximate cause. *Alison* v. *Corn Ex. Ins. Co.*, Ins. L. J., April, 1874.

8. MECHANICS' LIEN. — "COMMENCEMENT OF FORECLOSURE PROCEEDINGS." — A policy provided that "the commencement of foreclosure proceedings, or the levy of an execution, shall be deemed an alienation of the property." *Held*, that "the commencement of foreclosure proceedings," which was to be "deemed an alienation of the property," was not intended to refer to proceedings to enforce a mechanic's lien under the provisions of recent statutes. *Colt* v. *Phœnix Ins. Co.*, Ins. L. J., April, 1874.

See ESTOPPEL, 1; EVIDENCE, 8; PLEADING AND PRACTICE, 2, 8.

INTERNAL REVENUE.

See CONSTITUTIONAL LAW, 2; PLEADING AND PRACTICE, 1.

JURISDICTION.

1. AS TO DECISIONS OF THE COMMISSIONER OF THE GENERAL LAND OFFICE. — A court of equity may take cognizance of mistakes of law made by the commissioner of the general land office, but cannot review his findings of fact. *Hosmer* v. *Wallace*, Pac. Law Rep., April 7, 1874.

2. JURISDICTION OBTAINED BY TRICK OR FRAUD. — When the person of a party against whom a right of action exists is brought within the jurisdiction of a court by fraud or artifice, such court will not entertain the complaints of those who are shown to have been parties to the fraud or artifice; but will not refuse to regard service at the suit of an innocent party. *Adriance* v. *Lagrave*, Daily Reg., April 24, 1874.

3. Of suits against national banks. — The *habitat* of defendant being without the district, it was held that the court did not acquire jurisdiction by service upon a cashier who happened to be found within it. And that the practice act of June 1, 1872, did not change the rule. *Main* v. *Second National Bank*, Cent. L. J., May 7, 1874.

LANDLORD AND TENANT.

When land is taken by the sovereign the landlord is entitled to the value of the reversion subject to the term, and the tenant is entitled to the value of his term subject to the rent then due and to become due under his lease, and such further damages as he has sustained. But when rent is deducted from the lessor's damages for the time the lease has to run, and has been awarded to the lessee, in *equity*, it belongs to the lessor. The viewers ought to award this to the landlord and not to the tenant, the tenant being thereby released from his personal obligation to pay rent. *Fitzpatrick* v. *Pennsylvania R. R. Co.*, Leg. Int., May 8, 1874.

LEX LOCI.

Rule where question of title to personal property is raised outside of jurisdiction where the property was acquired. — Where the law of Pennsylvania was to the effect that a sale or mortgage of personal property without change of possession was conclusively fraudulent and invalid, and the property was to pass in that State; and the law in Ohio was that such sales and mortgages were only *primâ facie* fraudulent; in a suit in the latter State it was held that the rule by which the case was to be controlled was the law of Pennsylvania; that such law was not merely a rule of evidence but a foreign law that governed the question of title, and that the law of Ohio was ineffectual to modify or vary it. *Henderson et al.* v. *Thayer*, Am. Law Rec., May, 1874.

MALICIOUS PROSECUTION.

Corporation. — Agency. — An action for malicious prosecution will lie against a corporation where the prosecution was commenced and carried on by an agent generally authorized to act in its behalf, and the prosecution was not beyond the scope of his authority. *Fenton* v. *Wilson Sewing-Machine Co.*, Leg. Int., April 24, 1874.

MANDAMUS.

1. Nature and offices of the writ defined and expounded by Mr. Justice Strong. *United States* v. *Boutwell*, Cent. L. J., May 7, 1874.

2. Mandamus to government official. — Substitution. — Upon the death or retirement of a government official, the supreme court of the United States is powerless to direct a substitution of his successor, where the matter at issue is the question of the allowance of a writ of mandamus, the court having only appellate jurisdiction, and substitution involving both a new cause and new party. *Ib.*

3. Demand and refusal are always necessary to be shown before a mandamus can be awarded. *Ib.*

See Municipal Corporation, 2; Taxation, 3.

MARRIED WOMAN.

RATIFICATION AFTER DISCOVERTURE. — A ratification by a married woman after discoverture must be supported by consideration. *Brown* v. *Bennett*, Leg. Int., April 17, 1874; Leg. Chron., May 2, 1874.

MECHANICS' LIEN.

1. THE INDIANA STATUTE examined and expounded with reference to liens of furnishers for materials supplied to sub-contractor; payment before notice of lien; constitutionality of the act, &c. *Coulter* v. *Frese et al.*, Cent. L. J., April 16, 1874.

2. IMPROVEMENTS UPON LEASEHOLD ESTATE. — A mechanic's lien cannot be extended to include more than the improvements upon a leasehold estate. *St. Clair Coal Co.* v. *Martz*, Leg. Gazette, May 8, 1874.

See INSURANCE, 8; MINISTERIAL OFFICER, 2.

MINISTERIAL OFFICER.

1. CONSTABLE. — EXECUTION. — APPEAL. — A constable cannot be held liable for proceeding with an execution regular upon its face, even if an appeal has been taken. *Leonard* v. *Davis*, Leg. Int., April 17, 1874; *S. C.*, Leg. Chron., May 2, 1874.

2. LIABILITY OF SHERIFF TO MECHANICS' LIEN CREDITORS IN CASE OF IMPROPER PAYMENT. — A sheriff is liable to mechanics' lien creditors who are in time where he makes sale on a *fieri facias* and pays over the money to the *fi. fa.* creditor. *Bird* v. *Shirk*, Leg. Gazette, May 8, 1874.

MORTGAGE.

See EVIDENCE, 2; INSURANCE, 2, 8; LEX LOCI.

MUNICIPAL CORPORATION.

1. RULE AS TO GRADING STREETS. — PRIVATE RIGHTS. — While a municipal corporation has power to grade its streets, the mode in which the power is to be exercised is in reference to the rights of others in the enjoyment of their property, and is limited in the same way and to the same extent as the power of a private person in the use of his property, unless the corporation calls to its aid the right of eminent domain; and if it does that, the right is to be exercised on making compensation as required by the Constitution. *City of Pekin* v. *Brereton*, Chicago L. N., April 11, 1874.

2. SUBSCRIPTION IN AID OF RAILROAD. — MANDAMUS TO COMPEL ISSUE OF BONDS. — Where it appeared that an election, touching a subscription in aid of a railroad, had been held, without any proposition on the part of the railroad company, merely to test the will of the people, and the election resulted in favor of the subscription, it was held that mandamus would not lie to compel an issue of bonds, there being no contract. *Denver, &c. R. R. Co.* v. *Comm'rs of Pueblo Co.*, Cent. L. J., April 30, 1874.

See CORPORATION; NEGLIGENCE, 2; RAILROAD, 2.

NATIONAL BANK.

See JURISDICTION, 3; TAXATION, 1.

NEGLIGENCE.

1. A CONTRACTOR CONSTRUCTING A SEWER is not the agent of the city, and any negligence in the performance of the work is his negligence, and not that of the city. *O'Hale* v. *Sacramento*, Pac. Law Rep., April 28, 1874.

2. WHERE INJURY RESULTS IN PART FROM ACT OF PLAINTIFF. — Where a horse became unmanageable, and, as a consequence, fell into a hole in a street and was injured, the city was held to be liable. *Hull* v. *City of Kansas*, Cent. L. J., April 23, 1874.

NOTICE.

See INSURANCE, 3, 4.

PATENT.

1. A MISNOMER OF THE CHRISTIAN NAME of a patentee does not invalidate the grant where the body of the letters patent contains a designation by which the identity of the patentee is made apparent. *N. W. Fire Ext. Co.* v. *Phila. Fire Ext. Co.*, Leg. Gazette, April 24, 1874; Leg. Int., May 8, 1874.

2. HEIR OF ASSIGNOR OF INCHOATE RIGHT NOT A NECESSARY PARTY IN EQUITY. — The heir of a deceased inventor who has assigned an invention before the grant of letters patent is not a necessary party to proceedings in equity. *Ib.*

3. REJECTED APPLICATION. — While a "rejected application" is competent evidence of want of novelty as auxiliary proof, it is not in itself sufficient to invalidate subsequent letters patent. *Ib.*

4. AN ART BEING OLD, the application of old devices never before applied cannot be protected by letters patent. *Ib.*

5. THE ART OF EXTINGUISHING FIRES examined and discussed by McKennan, C. J. *Ib.*

6. AN ACTION FOR INFRINGEMENT survives against an administrator. *Smith* v. *Baker's Adm'rs*, Leg. Int., April 17, 1874.

PLEADING AND PRACTICE.

1. OFFENCES UNDER THE INTERNAL REVENUE ACTS may be prosecuted by information or indictment. *U. S.* v. *Ebert*, Cent. L. J., April 23, 1874.

2. AN ACTION BY AN INSURANCE COMPANY AGAINST AN INCENDIARY must be brought in the name of the owner of the property destroyed. *Ætna Ins. Co.* v. *H. & St. J. R. R. Co.*, Ib.

3. WHERE THE INTERESTS OF SEVERAL OWNERS of insured property are not clearly and distinctly stated, a single action may be maintained. *Strohn* v. *Hartford Fire Ins. Co.*, Ins. L. J., April, 1874.

4. WITNESSES ATTENDING WITHOUT SUBPŒNA, although not called upon to testify, are entitled to their costs, if it appears that subpœnas

were taken out but service waived, and that there was no allegation that their testimony was not wanted. *Lagresse* v. *Curran*, Leg. Int., May 8, 1874.

5. IN DIVORCE CASES a libel may specify a particular month in which the marriage was celebrated, but the respondent may deny the marriage and require the libellant to set forth the day and place upon and at which the marriage took place, the name of the person by whom it was celebrated, together with the names of witnesses who were present. *Brinkle* v. *Brinkle*, Leg. Int., May 8, 1874.

6. DEBT TO RECOVER TAX IN UNITED STATES CIRCUIT COURT. — An action of debt is maintainable in a circuit court of the United States to recover a tax upon the accumulated earnings of a savings institution carried to a contingent fund. And an assessment is not necessary to support such an action. *Dollar Savings Bank* v. *U. S.*, Albany L. J., May 9, 1874.

See JURISDICTION, 3; PATENT, 2, 6.

POWER OF ATTORNEY.

1. THE DISSOLUTION OF A COPARTNERSHIP works a revocation of a power of attorney to conduct the partnership affairs. *Schlater* v. *Winpenny*, Leg. Gazette, May 1, 1874.

2. BY HUSBAND AND WIFE TO SELL REAL ESTATE. — A power of attorney, given by a husband and his wife to sell real estate, in general terms, without any provision that restrains the sale of the interest of either separately, authorizes the attorney to convey the interest of the *husband only* by a deed made in his name. *Holladay* v. *Daily*, Chicago L. N., May 2, 1874.

PUBLIC LANDS.

RULE AS TO PRIVATE ENTRIES. — It is a fundamental principle underlying the land system of this country that private entries are never permitted until after the lands have been exposed to public auction, at the price for which they are afterwards subject to entry. *Eldred* v. *Sexton*, Chicago L. N., April 11, 1874.

RAILROAD.

1. STOPPING CARS IN FRONT OF EATING-HOUSE. — *Held*, that stopping freight cars and permitting them to stand in front of plaintiff's eating-house, that was adjacent to the track, furnished no cause of action. *Disbrow* v. *Chicago & N. W. R. R.*, Chicago L. N., April 18, 1874.

2. CONSOLIDATION OF RAILROADS. — EFFECT OF CONSOLIDATION IN RESPECT TO ISSUE OF AID BONDS. — The Alexandria and Bloomfield Railroad Company was chartered in 1857, and in its charter the privilege was given to the county court of the counties defendant to subscribe to its stock and issue bonds in payment thereof. Subsequently, that railroad company was authorized to change its corporate name and extend its line, and the name was changed accordingly. At a later date the company was authorized to consolidate with another company, and the consolidation having been effected the company so formed assumed a new name, and the counties defendant issued their bonds to it, the bonds reciting the provi-

sions of the charter of the Alexandria and Bloomfield Company as the authority upon which they were based, the changes of name, and consolidation. *Held*, that the bonds were valid and the counties defendant bound. *Thomas* v. *County of Scotland*, Cent. L. J., April 30, 1874.

See TAXATION, 2, 3.

RATIFICATION.

See MARRIED WOMAN.

REPLEVIN.

CROP OF TENANT OF EJECTED LANDLORD. — *Held*, that an action of replevin may be maintained against the tenant of an ejected landlord to recover crops removed after the surrender of possession. *Rowell* v. *Kline*, Chicago L. N., April 11, 1874.

SALE OF REAL ESTATE BY THE UNITED STATES.

HOW REQUIRED TO BE MADE. — The consent and approval of the secretary of the treasury is essential to a sale of real estate owned by the United States. The solicitor of the treasury is powerless to act without such approval. There is no default on the part of a purchaser in refusing to accept a deed where the approval of the secretary is not produced. *U. S.* v. *Jonas*, Chicago L. N., April 25, 1874.

SET-OFF.

See BANKRUPTCY, 1.

SHERIFF'S SALE.

See MINISTERIAL OFFICER, 2.

SPECIFIC PERFORMANCE.

MARRIED MAN. — REFUSAL OF WIFE TO BAR HER DOWER. — Specific performance of an agreement to sell land will not be decreed against a vendor who is a married man, and whose wife refuses to join in the conveyance so as to bar her dower, unless the vendee is willing to pay the full purchase money, and accept the deed of the vendor without his wife joining therein. *Burk's App.*, L. Chron., April 18, 1874; Leg. Gazette, May 8, 1874.

STAMP DUTY.

AN instrument in the following form: —

5.] IRON CLIFFS COMPANY, [Five.
1190. NEGAUNEE, Mich., *Jan.* 3, 1870.

Pay to the order of E. B. Isham, supt., or bearer,
FIVE DOLLARS.
Value received, and charge to account of E. B. ISHAM.
To CHARLES J. CANDA, Esq., New York.
Countersigned, E. S. GREEN, *Clerk.*

Held, to be a draft or check, and subject to duty accordingly. *U. S.* v. *Isham*, Leg. Gazette, May 8, 1874.

STATE DECISIONS.

HOW FAR BINDING ON UNITED STATES COURTS. — The courts of the United States will follow the state constructions "unless very cogent reasons to the contrary appear." *Thomas* v. *County of Scotland*, Cent. L. J., April 20, 1874.

TAXATION.

1. OF NATIONAL BANK SHARES BY STATE. — A state has the right to tax the shares of the capital stock of a national bank at the place where the bank is located, irrespective of the places of residence of the owners of the shares. *Tappan* v. *Merchants' Nat. Bank*, Chicago L. N., May 2, 1874; Leg. Gazette, May 8, 1874; Albany L. J., May 9, 1874.

2. ACCUMULATED EARNINGS OF SAVINGS INSTITUTIONS CARRIED TO CONTINGENT FUND. — The accumulated earnings of a savings institution carried to a contingent fund are subject to taxation under the act of Congress of July 13, 1866; and the act of July 14, 1870, was not intended to provide otherwise. *Dollar Savings Bank* v. *U. S.*, Albany L. J., May 9, 1874.

3. TAXATION OF RAILROAD EARNINGS. — LEGISLATIVE CONTRACT. — PACIFIC RAILROAD. — By an act of March 12, 1849, the Pacific Railroad Co. was incorporated with a capital of ten millions of dollars, for the purpose of building a railroad from the city of St. Louis to a point in the western line of Van Buren County. Authority was given to the counties through which it should pass to subscribe for the stock, and it was invested also with the powers usually conferred upon such companies. By an act passed February 22, 1851, it was enacted that when $50,000 had been collected of the capital stock and expended in the survey and construction of the road, the bonds of the State to the same amount should be loaned to the road, and farther loans were authorized not to exceed the sum of two millions of dollars.

By an act of December 25, 1852, certain public lands were vested in the company, and the company were authorized to build a branch road to the western boundary of the State south of the Osage River. Provision was made for the issue of an additional million of dollars of the bonds of the State to be used in aid of the work proposed, with precaution that subscriptions should have been made and should previously have been applied by the company to amounts stated, and that the bonds should not be sold at less than their par value, and that the road should be completed and put in operation within five years after the passage of the act. The twelfth section contained the following provisions: "The said Pacific Railroad and the Southwestern Branch Railroad shall be exempt from taxation respectively until the same shall be completed, opened, and in operation, and shall declare a dividend, when the road-bed, buildings, machinery, engines, cars, and other property of such complete road, at the cash value thereof, shall be subject to taxation at the rate assessed by the State on other real and personal property of like value." . . . . "Provided, that if said company shall fail for the period of two years after said roads respectively shall be completed and put in operation to declare a dividend, then the said company shall no longer be exempt from the payment of said tax, nor from the forfeitures and penalties in this section imposed."

This act and its grants were accepted by an instrument under seal, and filed with the secretary of state in compliance with the fifteenth section of the same act.

The road was completed and put in operation on the first day of April, 1866, but no dividend had been declared or paid when the levy in question was made, and two years had not elapsed from the completion of the road. On the fourth day of July, 1865, the present constitution of Missouri, together with an ordinance known as the railroad ordinance as a part thereof, went into effect. The provisions of the ordinance pertinent to this case are as follows: —

"SECTION 1. There shall be levied and collected from the Pacific Railroad, the North Missouri Railroad Co., and the St. Louis and Iron Mountain Railroad Co., an annual tax of ten per centum of all their gross receipts for the transportation of freight and passengers (not including amounts received from and taxes paid to the United States) from the first of October, 1866, to the first of October, 1868, and fifteen per centum thereafter; which tax shall be assessed and collected, in the county of St. Louis, in the same manner as other taxes are assessed and collected; and shall be appropriated by the general assembly to the payment of the principal and interest now due, or hereafter to become due, upon the bonds of the State and the bonds guaranteed by the State, issued to the aforesaid railroad companies.

. . . . . .

"SEC. 3. The tax in this ordinance specified shall be collected from each company hereinbefore named only for the payment of the principal and interest on the bonds for the payment of which such company shall be liable; and whenever such bonds and interest shall have been fully paid no further tax shall be collected from such company, but nothing shall be received by the State in discharge of any amount due upon such bonds except cash or other bonds or obligations of the State.

"SEC. 4. Should either of said companies refuse or neglect to pay said tax, as herein required, and the interest or principal of said bonds or any part thereof remain due and unpaid, the general assembly shall provide by law for the sale of the railroad and other property, and the franchises of the company that shall be thus in default, under the lien reserved to the State, and shall appropriate the proceeds of such sale to the payment of the amount remaining due and unpaid from said company."

In pursuance of this ordinance the defendant assessed a tax against the plaintiff for the year commencing October 1, 1866, of ten per cent. on $2,536,440, that being the gross earnings of the road for that year, which is the tax in question. By the agreed case it is stated that "this was assessed in the same manner as other state taxes were assessed in said county, ten per cent., as a tax under the ordinance hereafter recited, amounting to the sum of $253,644.

Held, first, that the 12th section of the act of 1852 created a contract between the State and the railroad company by which the railroad was exempt from taxation until it was completed and put in operation, and until it should declare a dividend on its capital stock, not, however, extending longer than two years after its completion.

Second, that the ordinance of 1853, imposing a tax of ten per cent.

upon the gross earnings before the road was completed and in operation and had declared a dividend, was a violation of this contract, and the levy for its enforcement was illegal. *Pacific R. R. Co.* v. *Maguire*, Cent. L. J., May 7, 1874.

4. MANDAMUS TO COMPEL TAX TO PAY BONDS WHERE LIMIT OF TAXATION HAS BEEN REACHED. — Where a special act under which the bonds of a county in aid of a railroad had been issued fixed a limit of taxation for the purpose of paying the bonds, and such act was recited upon the face of the bonds, and the purchaser took them innocently and for value before maturity, and the limit of taxation had been reached, it was held that mandamus would not lie to compel the levy of a tax in excess of the prescribed limit for the purpose of paying the bonds.

Held, also, that the fact of the existence of a general law authorizing county courts which have issued such bonds to tax without limit to pay the interest, and to create a sinking fund to pay the principal, did not warrant a mandamus. *State, &c.* v. *County Court of Macon*, Cent. L. J., May 7, 1874.

See BANKRUPTCY, 6.

TENDER.

WORTHLESS STOCK. — REASONABLE TIME. — The question whether stock, discovered to be worthless, was tendered to the defendant within a reasonable time is, where the parties are not dealers in stocks, a question of fact to be determined by the jury. *Lanbach* v. *Lanbach*, Leg. Chron., April 11, 1874.

VERDICT.

CONVERSATION WITH WITNESS BY JUROR. — Unless some improper influence can be shown to have been caused thereby, a verdict will not be set aside on the ground that a juror conversed with a witness before or during the trial. *Shomo* v. *Zeigler*, Leg. Chron., April 18, 1874.

VOLUNTARY PAYMENT.

DEFINED. — Where a party pays for goods in the hands of another that are exposed to risk of fire and damage, the payment is not voluntary. *Root & Rust* v. *Oil Cr. &c. R. R. Co.*, Leg. Int., May 1, 1874.

WILL.

THE WORD "MONEY," the intent being clear, held to include real estate under the laws of California. *Estate of Miller*, Pac. Law Rep., April 14, 1874.

NOTES OF CASES.

LIFE INSURANCE. — *Tait* v. *N. Y. Life Ins. Co.*

THE case of *Tait* v. *N. Y. Life Ins. Co.*, involving, among other questions, the effect of war upon contracts of insurance, and deciding that such contracts are abrogated as soon as the parties become enemies, was passed upon by Judge Emmons at the June term, 1873, of the circuit court of the United States for the Western District of Tennessee.

Owing to ill-health its learned author has not been able to revise and condense the very lengthy notes which were used at the time the opinion was delivered, so that it has not appeared in authentic form. A full statement, however, of the views of the court, together with the authorities relied on, will be found in the *Insurance Law Journal* for November, 1873.

THE TWELFTH RULE IN ADMIRALTY. — *Wilson et al.* v. *Bell et al.*

THE following extract from the opinion of the supreme court of the United States in the case of *Wilson et al.* v. *Bell et al.*, recently delivered, may foreshadow another change in the Admiralty Rules. The opinion is by Mr. Justice Clifford: —

"Much embarrassment has existed ever since the old Twelfth Admiralty Rule was repealed, as the new rule makes no provision to enforce the payment of contracts for repairs and supplies furnished to domestic ships, except by a libel *in personam*. Repeated judicial attempts have been made to overcome the difficulty, none of which have proved satisfactory, because they failed to provide a remedy in the admiralty by a proceeding *in rem*. Inconveniencies of the kind have been felt for a long time, until the bench and bar have come to doubt whether the decision, that a maritime lien does not arise in a contract for repairs and supplies furnished to a domestic ship, is correct; as it is clear that the contract is a maritime contract, just as plainly as the contract to furnish such repairs and supplies to a foreign ship or to a domestic ship in the port of a state other than that to which the ship belongs. Abbott on Shipp. pp. 143, 148.

"Such a remedy is not given even in the latter case, unless the repairs and supplies were furnished *on the credit of the ship*, and it is difficult to see why the same remedy may not be given in the former case if the repairs and supplies were obtained by the master on the same terms. 5 Am. Law Review, 612; *The Lawrence*, 1 Bl. 529; 7 Am. Law Review, 8; *The Harrison*, 2 Abb. U. S. R. 78; *The Belfast*, 7 Wall. 645–6.

"These and many other considerations have had the effect to create serious doubts as to the correctness of the decision made more than fifty years ago, that a maritime lien does not arise in such a case. *The General Smith*, 4 Wheat. 448.

"Expressions, however, to the same effect are found in other opinions of this court, and inasmuch as the question is not satisfactorily put in issue in the pleadings in this case, and does not appear to have been directly presented to the circuit court by either party, the court here is not inclined to enter more fully into the consideration of it at the present time."

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DIGEST OF CASES

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ABBREVIATIONS.

Albany L. J. ..... *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & Co.
Am. Law Reg. ..... *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & Co.
Cent. L. J. ..... *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.
Chicago L. N. ..... *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS Co.
Daily Reg. ..... *Daily Register*, New York, 303 BROADWAY, N. Y.
Ins. L. J. ..... *Insurance Law Journal*, New York, C. C. HINE, 176 BROADWAY.
Int. Rev. Rec. ..... *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
Leg. Chron. ..... *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
Leg. Gazette ..... *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.
Leg. Int. ..... *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
Pac. Law Rep. ..... *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
Pittsb. L. J. ..... *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
West. Jur. ..... *Western Jurist*, Des Moines, Iowa, MILLS & Co.

ADMIRALTY.

1. INABILITY OF STATE TO CREATE A MARITIME LIEN. — It is settled law that a state cannot create a maritime lien nor confer jurisdiction upon a state court to enforce such a lien by proceedings *in rem*. *Wilson* v. *Bell*, Chicago L. N., May 9, 1874; Int. Rev. Rec., May 25, 1874.

2. MARITIME LIENS FOLLOW THE PROCEEDS, but an admiralty court has no jurisdiction to distribute the same. *Ib.*

3. PROCEEDS FOLLOW THE CAUSE to the circuit court where they remain as long as the litigation continues. *Ib.*

4. LACHES IN ENFORCING LIEN FOR WAGES. — A seaman's lien for wages will not be enforced in admiralty, as against a *bonâ fide* purchaser, after the lapse of two seasons. Such a claim has become "stale."

Though courts of admiralty are not governed by any absolute rule of limitations, they will never do injustice to *bonâ fide* purchasers by the

enforcement of old secret liens. *The Harriet Ann*, Chicago L. N., May 9, 1874.

5. A MINOR MAY SUE IN ADMIRALTY for wages where the contract was made with him personally, and it does not appear that he has any parent, guardian, or master entitled to receive his earnings. *The Mellissa*, Chicago L. N., May 16, 1874.

6. STALE CLAIM. — In order to maintain the defence of stale claim, it is necessary to allege and prove that the respondents are purchasers in good faith, for a valuable consideration, and without notice of the existence of the claim. *Ib.*

7. TUG AND TOW. — RESPONSIBILITY OF TUG. — With the exception of steering the tow, working her pump, and handling her end of the tow line, the tug is responsible for the navigation of both vessels. Her duties are those of a private carrier of the tow for hire, just as much as if she had the tow upon her own deck instead of astern at the end of a tow line. *The Merrimack*, Pac. Law Rep., May 12, 1874.

8. NEGLIGENCE BY TUG HAVING TOW IN CHARGE. — As a bailee for hire the master of a tug is bound to exercise ordinary skill and prudence in selecting a proper time to make the voyage with reference to the character of the tow, wind, tide, and other peculiarities of the navigation.

If the tow be placed in peril by the negligence of the tug, it is no defence that the tow might have been saved if her crew had been more skilful.

WHERE THE TOW HAS PARTED FROM THE TUG, and being in peril is injured by the tug colliding with her while attempting to rescue her crew, the tug is not liable. *Ib.*

ATTORNEY.

A PURCHASE BY A PLAINTIFF'S ATTORNEY, at a sale under a judgment in favor of such plaintiff, has the effect of constituting the attorney a trustee. *Barrett* v. *Bamber*, Leg. Int., May 22, 1874.

BANKRUPTCY.

1. A RECEIVER OF A CORPORATION, duly appointed in pursuance of the law where the corporation was created, will be recognized in bankruptcy proceedings as the representative of the corporation for all legal purposes. *In re Republic Ins. Co.*, Ins. L. J., May, 1874.

2. FRAUDULENT PREFERENCE. — Where it appeared that judgments were entered against the bankrupts, upon warrants of attorney, a few days before the institution of bankruptcy proceedings, and executions issued which were levied upon all their available assets and their business at once broken up, it was held that such judgments were fraudulent preferences, and that the case of *Wilson* v. *Bank of St. Paul*, 1 Am. L. T. R. N. S. 1, did not establish otherwise. *Zahm* v. *Fry et al.* Pittsb. L. J., May 20, 1874.

3. OF THE JURISDICTION OF A BANKRUPTCY COURT IN RESPECT OF STATE COURT. — A court of the United States sitting as a court of bankruptcy has power to restrain the officers of a state court as well as suitors therein, and, generally, to fulfil all the exigencies of the bankruptcy act. *Ib.*

4. TITLE ACQUIRED UNDER VOIDABLE JUDGMENT. — Where A purchased real estate under a judgment of a state court entered before the filing of a petition in bankruptcy to set aside the judgment, and had constructive notice of the filing of the petition, and the judgment was voidable in bankruptcy on the ground of fraud, it was held that A took a good title, it not appearing that he had notice of the character of the judgment. *Ib.*

5. AS TO INSTRUCTION OF ASSIGNEE BY COURT. — A court of bankruptcy will not instruct an assignee, unless some question of disputable right is presented calling for judicial determination. *In re Franklin Sav. Fund Society*, Leg. Int., May 29, 1874.

BILLS AND NOTES.

1. PROMISSORY NOTE. — FAILURE TO READ. — NEGLIGENCE. — *Held*, that where the defendant signed a promissory note without reading it, supposing it to be a contract of another nature, the failure to read the note was negligence, which rendered defendant liable upon suit by an innocent holder for value. (New York Court of Appeals.) *Chapman* v. *Rose*, Albany L. J., May 23, 1874; Central L. J., May 14, 1874.

2. NOTE WRITTEN IN GERMAN. — A note written in German need not be declared upon as in the German language. *Williams* v. *German Mut. Fire Ins. Co.*, Chicago L. N., May 9, 1874.

3. DUE BILL — REASONABLE TIME. — A due bill, signed by the defendants, was given in the following form: —

"Due Joseph Dautel, or order, $1,619.66, being balance of principal and interest for four years and six months' services. This we will pay as soon as the crop can be sold or the money raised from any other source. Payable with interest."

After the lapse of five years plaintiff brought suit, and it was held that he was entitled to recover. *Nunez* v. *Dautel*, Pac. Law Rep., May 19, 1874.

CONSTITUTIONAL LAW.

1. THE OBLIGATION OF CONTRACTS DEFINED AND EXPOUNDED. — The obligation of a contract is the duty of performance according to its terms, the means of enforcement being a part of the obligation, which the states cannot by legislation impair. The municipal law enters into and forms part of this obligation; and to that parties must be considered as referring in order to enforce performance.

Whilst a state may modify the remedy, it is under a duty, if it interferes at all, to provide a remedy as sufficient and substantial as that subsisting when the contract was made. The remedy is inseparable from the obligation, otherwise the contract would be of the nature of those imperfect obligations or moral duties subject to the mere caprice and will of individuals. Whilst a state is free to alter the remedy, to prescribe the modes of suit and process, it cannot clog it with conditions and restrictions so as materially to impair its efficiency. *Lasly* v. *Phipps*, Am. Law Reg., April, 1874.

2. RAILROAD TARIFF. — POLICE REGULATION. — A state law contained the following: —

"In the month of September, annually, each railroad company shall fix its rates of fare for passengers and freight, for transportation of timber, wood, and coal per ton, cord, or thousand feet per mile; also, its fare and freight per mile for transporting merchandise and articles of the first, second, third, and fourth grades of freight; and on the first day of October following shall put up at all stations and depots on its road a printed copy of such fare and freight, and cause a copy to remain posted during the year. For wilfully neglecting so to do, or for receiving higher rates of fare or freight than those posted, the company shall forfeit not less than one hundred dollars, nor more than two hundred dollars, to any person injured thereby and suing therefor." *Held*, that the law was merely a police regulation, and therefore not unconstitutional. *C. & N. W. R. W. Co.* v. *Fuller*, Albany L. J., May 16, 1874.

3. ASSESSMENT FOR PAVING STREET. — An act of the legislature of New Jersey provided as follows: —

"That when more than one half of the owners of the frontage on the line of any street, or section thereof, which is now paved, shall apply to have such street or section repaved, it may be lawful for the common council to order and cause the repaving thereof, and they shall assess upon the owners of the lots fronting upon the line of such street or section thereof, two thirds of the cost and expenses of such repaving, and the city treasury shall bear the remaining one third; and the city shall be entitled to all the old material, and said assessment to be made in all respects as were required by the act to which this is a supplement and the supplements thereto in cases of the original paving of streets." *Held*, that the provision was unconstitutional; that the benefit was *local*, and that, therefore, any *general* taxation was inadmissible. *Mayor, &c. of Newark* v. *State, &c.*, Cent. L. J., May 21, 1874.

4. TITLE OF ACT. — The essence of the requirement, that an act shall not contain more than one subject, which shall be clearly expressed in the title, is that all the subjects dealt with in the act shall be *cognate* to the title. *Schall* v. *Norristown*, Leg. Gazette, May 15, 1874.

5. PUBLIC MUNICIPAL IMPROVEMENTS. — An act which provides for the payment of the expense of the improvements of a city by those directly benefited is not unconstitutional. *Ib.*

CONTRACT.

1. LEGISLATIVE CONTRACT. — HIGHWAY. — Although a legislative enactment creating a private corporation is a contract, it does not follow that an enactment providing for the opening of a highway in a particular manner is a contract that for all time the manner provided in the enactment shall be the only manner in which the highway may be opened. *In re Girard College Grounds*, Leg. Gazette, May 22, 1874; Leg. Int., May 22, 1874.

2. LEGISLATIVE CONTRACT DISTINGUISHED. — TAXATION. — Where an act, under which a railroad company was formed, prescribed the payment of a particular tax, it was held that such act was not an agreement that no other tax should be levied, but a mere declaration of the tax to be paid at the time of the passage of the act. *Minot* v. *P. W. & B. R. R.*, Chicago L. N., May 16, 1874.

ESTOPPEL.

See HUSBAND AND WIFE, 3.

EVIDENCE.

1. AS TO GENUINENESS OF TREASURY NOTE. — Bankers are competent to testify as experts to determine the genuineness of a treasury note. The opinions of persons through whose hands it has passed may, however, be inadmissible. *Atwood* v. *Cornwall*, Am. Law Reg., April, 1874.

2. OPINIONS AS TO QUALITY are incompetent unless there be fraud or warranty. *Whitaker* v. *Eastwick*, Leg. Int., May 22, 1874.

3. EJECTION FROM CAR ON RAILROAD. — OFFER TO PAY UPON SURRENDER OF TICKET. — A party purchased a ticket to a particular place, before arriving at which he voluntarily left the train without informing the conductor of any intention to continue the journey to the place named on the ticket. Several days afterward he attempted to ride upon the ticket to the place named, upon another train, the conductor of which took up the ticket and put the party off. In an action for damages, the exclusion of evidence that the party offered to pay upon a surrender of his ticket was held to be error. *Vankirk* v. *Penn. R. R. Co.*, Leg. Gazette, May 29, 1874.

4. DECLARATIONS OF TICKET AGENT AFTER SALE OF TICKET. — Evidence of the declarations of a ticket agent as to a party's right to ride upon a ticket which the agent had sold, held to be inadmissible as evidence of a contract, but not inadmissible as evidence of the good faith of the party in his claim to ride upon the ticket. *Ib.*

5. PARTY ON RAILROAD PERMITTED TO RIDE PAST STATIONS. — PUTTING PARTY OFF BETWEEN STATIONS. — The conductor having suffered the plaintiff to ride past several stations before ejecting him, and then having put him out, remote from any shelter, and in a severe storm: it was *held*, that those circumstances might be considered by the jury in deciding whether the conductor intentionally selected an inhospitable spot, or whether it happened to be the locality of the plaintiff's persistent refusal to pay. *Ib.*

6. AFFIRMATIVE PROOF TO REBUT EVIDENCE OF DIFFERENT STATEMENT OUT OF COURT. — When an attempt is made to impeach a witness by proving former contradictory statements, he may be supported by evidence that he has made to other persons declarations consistent with his testimony. Such is the law of Indiana, and perhaps of Pennsylvania and North Carolina. In New York, as in England, after much uncertainty, the rule seems now to be settled that such evidence is ordinarily inadmissible; and in others of the states it is rejected. The best elementary writers reach the conclusion that the evidence is to be received only in exceptional cases. *People* v. *Doyell*, Pac. Law Rep., May 5, 1874.

See HUSBAND AND WIFE, 1.

HOMESTEAD EXEMPTION.

1. THE MISSISSIPPI STATUTE of 1865 held to be unconstitutional in so

far as it applies to debts created before its passage. *Lasly* v. *Phipps*, Am. Law Reg., April, 1874.

2. CONSTRUCTION of the homestead act of Missouri, and discussion of the nature of homestead exemptions and the laws which relate thereto. *Volger* v. *Montgomery*, Am. Law Reg., April, 1874.

HUSBAND AND WIFE.

1. HUSBAND NOT COMPETENT WITNESS. — In Wisconsin the husband is not competent as a witness for his wife; this incompetency rests on grounds of public policy, and is not removed by the statute removing the disqualification of interest. *In re Jones*, Chicago L. N., May 16, 1874.

2. SECURITIES TAKEN IN WIFE'S NAME will not pass to her as her separate property, if they were so drawn simply for convenience: it must clearly appear that they were intended as a settlement upon her.

Where such securities are used and collected by the husband with the wife's consent, this conduct disproves the claim that they were intended as a settlement upon her.

The wife having allowed the husband to enjoy the credit of such securities and their proceeds, cannot afterwards claim them as against creditors who have trusted him on the faith of such apparent ownership. *Ib.*

3. ESTOPPEL. — If the wife joins the husband when embarrassed in conveying his property to their children, making no claims for herself, she cannot afterwards set up a claim when such conveyances are about to be set aside. *Ib.*

4. CREDIBILITY OF WIFE'S TESTIMONY. — Where the wife's testimony is defective and contradictory, particularly about the most material matters, her statements as to the amount of her claim should be looked upon with suspicion. *Ib.*

5. OPERATION OF PROPERTY ACT ON VESTED RIGHTS. — A note given to the wife for money loaned by her while unmarried, and prior to the passage of the Married Woman's Property Act, passes to the husband under the common law rule, and his vested interest therein cannot be abrogated by any subsequent act of the legislature; and though he receives the money thereon she cannot prove the amount against him as a debt in bankruptcy. *Ib.*

6. RECEIPT OF INCOME OF WIFE'S ESTATE. — A married woman may bestow upon her husband the *income* of her separate estate; and where the husband, with the consent of the wife, is in the habit of receiving such income and profits, her voluntary choice to thus dispose of them for the use and benefit of the family is sufficiently apparent, and the husband will not be required to account therefor, beyond the amount received during the last year.

A claim founded upon such receipt of income and profits will not be allowed against the husband's estate.

The fact that no account was kept by either party as to the money thus received, strengthens the presumption of law that there is no agreement to repay it. *Ib.*

See MARRIED WOMAN.

INTERNAL REVENUE.

1. LIABILITY OF SURETIES FOR TRANSPORTATION OF GOODS IN BOXES. — The sureties upon a bond for the transportation of goods in boxes from one district to another are responsible for the delivery of the *contents* of the boxes, and not for the delivery of the *boxes only*, in the condition in which they were started.

The fraud of a principal, in filling the boxes with something other than they purported to contain, is no excuse. Nor is the carelessness of the inspecting officer. *Ryan* v. *U. S.*, Chicago L. N., May 16, 1874.

2. CONSTRUCTION OF ACT OF JULY 20, 1868. — Under the act of Congress of July 20, 1868, entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes" (15 Stat. at Large, 125), the assessor and his assistant, in estimating the true producing capacity of a distillery, are empowered to fix, as the true fermenting period, a period other than that which the distiller in his notice to the assessor, required by the sixth section, has declared he would use for fermentation, and which he actually did use. *Pahlman et al.* v. *Raster*, Chicago L. N., May 23, 1874.

JUDGMENT.

1. THE RECORD OF A JUDGMENT OF ANOTHER STATE may be contradicted as to any and all the facts that give jurisdiction, and proof to invalidate such judgment adduced. The provisions of the Constitution of the United States and the act of Congress in pursuance thereof do not affect the rule. *Thompson* v. *Whitman*, Leg. Int., May 15, 1874.

2. BY A STATUTE OF NEW JERSEY NON-RESIDENTS were prohibited from raking in the waters within the jurisdiction of that State, under a penalty of seizure and forfeiture of the offending vessel, any two justices of the county where the seizure was made being authorized to determine the case. *Held*, that in an action brought in New York, the fact of the seizure being made in the county wherein a forfeiture was had under the New Jersey statute might be inquired into. *Ib.*

3. NOT AFFECTED BY SUBSEQUENT LEGISLATIVE ENACTMENTS. — An order having been made in a divorce case requiring certain payments by the husband who subsequently obtained an act of the legislature dissolving the marriage, it was held that the order of the court was unaffected by such act. *City* v. *Thiele*, Leg. Int., May 29, 1874.

See ATTORNEY.

LIMITATIONS.

BIGAMY. — The crime of bigamy is not a continuing offence, to which the statute of limitations does not apply. *Commonwealth* v. *McNerny*, Leg. Int., May 29, 1874.

MARRIAGE.

What constitutes a marriage in the State of New York. *Wright* v. *Wright*, Daily Reg., May 29, 1874.

MARRIED WOMAN.

1. REQUISITES OF DEED OF. — ACKNOWLEDGMENT. — The deed of a married woman must be executed in exact conformity with statutory provisions. Where the acknowledgment does not state that she was made acquainted with the contents of the deed, it is insufficient to pass her estate.

Where the name of a married woman was not found in the body of a deed, although it was signed to the deed, and the certificate of acknowledgment stated that she had acknowledged that she had relinquished her dower, it was *held*, that the deed did not pass her title to the property. *Heaton* v. *Fryberger*, West Jur., May, 1874.

2. THE OMISSION OF THE WIFE'S NAME in the body of a deed cannot be corrected in equity. *Ib.*

3. CANNOT PRACTISE IN COURT OF CLAIMS. — A married woman's application to practise in the court of claims of the United States refused, upon the ground of want of capacity to take the office of an attorney. *In re Lockwood*, Cent. L. J., May 21, 1874; Chicago L. N., May 23, 1874.

See HUSBAND AND WIFE.

MORTGAGE.

EFFECT OF WAR UPON POWER TO SELL. — NOTICE. — Where the mortgagor is voluntarily in the hostile country, a state of war does not suspend or in any way impair a power in the mortgage to sell in the event of default. The notice required to be given when sale is made has for its object a fair sale of the mortgaged premises, and is not for the benefit of the mortgagor in the sense of notice to him. *Dejiverville* v. *Dejarnette*, Am. Law Reg., May, 1874.

MUNICIPAL CORPORATION.

1. CHANGE OF CHARTER. — EFFECT UPON OBLIGATIONS. — Where a municipal corporation surrenders its charter and organizes under a general law, the new corporation is not liable for the debts of the old. *Jones* v. *Pensacola*, Chicago L. N., May 9, 1874.

2. AN ORDINANCE REQUIRING DRINKING SALOONS to be closed at midnight is reasonable, as a municipal regulation to preserve quiet and good order. *Baldwin* v. *Chicago*, Chicago L. N., May 16, 1874.

3. POWER OF MUNICIPAL CORPORATION IN RESPECT OF AUCTIONEER. — While a city cannot directly prohibit the business of auctioneering, it may make any reasonable regulation respecting it. *Wiggins* v. *Chicago*, Chicago L. N., May 16, 1874.

4. LIABILITY WHERE A WORK OF A PUBLIC NATURE IS INTRINSICALLY DANGEROUS. — A city is liable for an injury caused by the negligence of a contractor when the injury occurs by reason of the intrinsic danger of the work. A boy was killed by the falling of a wedge from a bridge in a city, the bridge being in process of construction and in charge

of a contractor. It was *held*, that the city was liable. *Rose* v. *Philadelphia*, Leg. Int., May 22, 1874.

NEGLIGENCE.

1. CROSSING TRAIN BETWEEN CARS IN CITY. — A plaintiff was injured while attempting to cross a train of cars by climbing between two of them which blocked a crossing of a street of a city. The injury was caused by a sudden movement of the train, and it appeared that the railroad company were prohibited from blocking the crossing by an ordinance. *Held*, that plaintiff could not recover, as the attempt to cross the train as shown was contributory negligence. *Lewis* v. *B. & O. R. R. Co.*, Am. Law Reg., May, 1874.

See ADMIRALTY, 8; BILLS AND NOTES, 1; MUNICIPAL CORPORATION, 4.

NOTICE.

See BANKRUPTCY, 4; MORTGAGE.

PARTNERSHIP.

PARTNERSHIP REAL ESTATE. — DISTRIBUTION OF PROCEEDS OF SALE OF, UPON DEATH OF PARTNER. — When real estate has been held as partnership stock, the firm dissolved by the death of one of the members, and a settlement and balance ascertained to be due by the surviving partner to the estate of the deceased, such balance, as far as derived from the sale of the realty, is to be distributed as real estate. *Foster's App.*, Am. Law Reg., May, 1874.

See REMOVAL OF CAUSES, 3.

PLEADING AND PRACTICE.

1. EFFECT OF MOTION FOR NONSUIT UPON FACTS IN APPELLATE COURT. — A defendant by making a motion for a nonsuit concedes that there is no dispute as to the facts. And this rule cannot be altered by the presentation in the appellate court of questions not made below. *Excelsior Fire Ins. Co.* v. *Royal Fire Ins. Co.*, Ins. L. J., May, 1874.

2. AVERMENT OF NOTICE IN DECLARATION IN ACTION UPON POLICY OF INSURANCE. — A policy of insurance contained a provision that the insured should give immediate notice, &c. *Held*, that a complaint containing the allegation that "proof of said loss has been duly made and notice given," was not sufficient to support the action. *Home Ins. Co.* v. *Duke*, Ins. L. J., May, 1874.

3. AVERMENT OF CONVERSION. — OBJECTION. — OMISSION TO FIND FACT. — An allegation that defendant took and carried away the property is a sufficient averment of conversion.

Objection cannot be made to evidence in the supreme court for the first time.

The omission to find a fact that is not against the appellant is no ground for reversal. *Hutchings* v. *Castle*, Pac. Law Rep., May 5, 1874.

See ADMIRALTY, 3, 5; BILLS AND NOTES, 2; REMOVAL OF CAUSES.

PRINCIPAL AND SURETY.

See INTERNAL REVENUE, 1.

RAILROAD.

See CONSTITUTIONAL LAW, 2; EVIDENCE, 3, 4, 5.

RECEIVER.

See BANKRUPTCY, 1.

REMOVAL OF CAUSES.

1. CITIZENSHIP. — CONSTRUCTION OF ACT OF JULY 27, 1866. — Under the act of July 27, 1866, touching the removal of causes from a state court into a court of the United States, the only requirements in respect of citizenship are that the defendant applying for the removal shall be a *bonâ fide* citizen of another state, and the plaintiff a *bonâ fide* citizen of the state in which the proceedings have been begun. *McGinnity* v. *White*, Cent. L. J., May 14, 1874.

2. MATTER IN DISPUTE. — INTEREST. — In estimating "the matter in dispute," under the act of July 27, 1866, accrued interest up to the time of the application for removal may be added to the amount originally sued for. Where the original sum claimed was $445, and by continuances the cause remained pending in the state court until interest in excess of $55 had accrued, "the matter in dispute" was held to "exceed the sum of $500." *Ib.*

3. A PARTNER, ONE OF SEVERAL DEFENDANTS, may have a cause removed, under the act of July 27, 1866, as far as concerns himself, without regard to his copartners. *Ib.*

4. UNDER THE ACT OF MARCH 2, 1867, after a final judgment has been rendered in the state court, the case cannot be removed to the circuit court of the United States, and "there proceed," as the statute provides, "in the same manner as if brought there by original process," without setting aside the trial and judgment of the state court as of no validity. No such proceeding is contemplated by the act; and since the decision of *Murray* v. *The Justices of New York* (reported in 9 Wall. 274), legislation directed to that end, where, at least, the trial has been by jury, would be of doubtful validity. *Stevenson* v. *Williams*, Chicago L. N., May 9, 1874.

STATE COURT.

See BANKRUPTCY, 3; REMOVAL OF CAUSES.

STATE DECISIONS.

IN UNITED STATES SUPREME COURT. — In the construction of the statutes of a state, and especially those affecting titles to real property, where no federal question arises, the United States supreme court follows the adjudications of the highest court of the state. Its interpretation is accepted as the true interpretation, whatever may be the opinion of its original soundness. It becomes a part of the statute, as much so as if incorporated into the body of it. *Walker* v. *State Harbor Comm'rs*, Leg. Gazette, May 15, 1874.

DISTRICT COURT OF THE CITY OF PHILADELPHIA.

[MAY, 1874.]

EFFECT OF PROOF OF DEBT IN BANKRUPTCY. — RIGHTS OF PARTY WHO HAS PROVED HIS CLAIM IN RESPECT OF FORMER REMEDIES. — RIGHTS OF PARTY NOT BEFORE BANKRUPTCY COURT.

DINGEE v. *BECKER.*

The proof of a debt in a bankruptcy court does not extinguish it. In case of there being no discharge the creditor still has his original remedies. And in case there is unreasonable delay he may move to speed a determination of the bankruptcy proceedings in the bankruptcy court. But he cannot proceed elsewhere as long as such proceedings remain unconcluded.

A creditor, however, who has not proved his debt in bankruptcy, and is not a party to the proceedings in the bankruptcy court, may, in case of unreasonable delay, proceed in another court, and such court will decide the question of delay.

THAYER, J. The plaintiff obtained a judgment against the defendant in the year 1862. The defendant was adjudged a bankrupt on September 3, 1869. The plaintiff proved his debt in bankruptcy. The defendant has never obtained any discharge, and there seems to have been unreasonable delay on his part in endeavoring to obtain it. Under these circumstances the plaintiff issued the present execution, and the defendant has moved to set it aside. Upon the argument it was strenuously maintained by the defendant's counsel that the plaintiff, having proved his debt in bankruptcy, is forever precluded by section 21 of the bankrupt act from pursuing the defendant at law. Proof of the debt, it was argued, operates under the statute as a complete satisfaction and discharge of the debt, whether the bankrupt be discharged or not.

[The court here quotes section 21.]

If this section of the act stood alone it would be difficult to avoid the conclusion insisted upon by the defendant, viz.: that the creditors who prove their debts are thereby absolutely and forever precluded from making any further claim upon the bankrupt for the same cause, and from maintaining any suit at law against him for it, or issuing any execution against him to collect it. And that result would follow without regard to the issue of the proceedings in bankruptcy. Whether the defendant obtained his discharge or not, the claim of the proving creditor would be absolutely extinguished, and he could, under no circumstances, demand anything but his dividend out of the bankrupt's estate.

But in interpreting a statute we are to examine the whole of it in order to determine its meaning and effect, and not a particular part of it. We are to collect its meaning, not from one section, but from the whole instrument — *ex antecedentibus et consequentibus.* Every part of it is to be brought into action, in order to collect from the whole one uniform and consistent sense.

Applying this fundamental rule of interpretation to the bankrupt law, it is quite impossible to give to the 21st section the unqualified effect which the defendant's counsel attributes to it. By the 29th section, which regulates the bankrupt's discharge, notice is required to be given of the bankrupt's application for a discharge to all creditors who have proved

their debts. They are to be required to appear on a day appointed for the purpose, and show cause why a discharge should not be granted to the bankrupt. If they can show that the bankrupt has been guilty of either of the disqualifying acts therein mentioned, his discharge is to be refused. By the 31st section such creditors may have an issue awarded to try the facts upon which their opposition to the discharge is based. By the 34th section creditors who have proved their debts, or whose debts were provable, may contest the validity of a discharge which has been already granted, on the ground that it was fraudulently obtained, and if, upon the hearing, the fraud is found, "judgment shall be given in favor of said creditors, and the discharge of the bankrupt shall be set aside and annulled." Now for what purpose are creditors who have proved their debts to be notified of the bankrupt's application for a discharge, and given an opportunity to oppose it, if their claims upon the bankrupt are not to be affected by his discharge? If their claims are barred by having proved their debts, whether the bankrupt be discharged or not, of what avail is it to oppose his discharge? And why are they permitted to apply to the court to annul a discharge obtained by fraud if they are not to be affected by the result? And what kind of a judgment is that which is to be given "in favor of such creditors," if it be a judgment which leaves their claims unsatisfied and extinguished, while it annuls the discharge?

Such an interpretation of the act is altogether inconsistent with its provisions. That which extinguishes the bankrupt's debts, whether they be proved or only provable, is his discharge. His release is entirely dependent upon that. This results not only from a comparison of the various provisions of the act, but is the necessary conclusion from the language of that portion of it which declares the effect of the proceedings in bankruptcy upon the bankrupt's debts. "A *discharge* duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities, and demands, which were, or might have been, proved against his estate in bankruptcy." Sec. 34. It is the *discharge* which he is to plead. Ib. And it is the certificate of discharge which is to be "conclusive evidence in favor of such bankrupt." Ib. The whole scheme of the law and its several provisions examined in detail show conclusively that if the bankrupt's application for a discharge is refused, all the creditors, as well those who have proved their debts as those who have not, are remitted to their former rights and remedies.

What then is the meaning of the strong language used in the 21st section of the act, relative to creditors who have proved their debts? Taking the whole act together and collecting its meaning from all its parts, the only construction which will reconcile the several parts, and which will bring the whole into unity and conformity, is, that creditors who have proved their claims are temporarily barred during the pendency of the proceedings in bankruptcy from pursuing their claims against the bankrupt in any other forum. We do not now consider the creditors' rights in regard to the enforcement of specific liens, but so far as concerns their personal claims against the bankrupt they are conditionally discharged and surrendered. By submitting themselves to the jurisdiction and becoming parties to the proceedings they have precluded themselves from proceeding against the bankrupt in any other manner without the leave of the court which has acquired jurisdiction of their claims. They must await the re-

sult of the bankrupt's application for his discharge. If it is refused, they are then free to pursue their claims by other means and in other tribunals. If the bankrupt unreasonably delays his application for a discharge, or is guilty of laches in his efforts to bring it to a conclusion, the creditor who has proved his debt is still incapable of proceeding elsewhere without the permission of the court of bankruptcy. In such a case he must speed the proceedings in bankruptcy himself, and obtain a decision of the bankrupt's application, or if the bankrupt refuses to make it, or is negligent in prosecuting it, the proving creditor must obtain leave of that court to proceed to collect his debt by due course of law. Until the question of the bankrupt's discharge is determined, he cannot, without the permission of the court of bankruptcy, seek redress in another jurisdiction.

If he has obtained a judgment against the bankrupt, it is, so far as the other creditors are concerned, discharged and surrendered, and he can come in on the bankrupt's estate only *pro rata* with them. But so far as the bankrupt himself is concerned, it remains in abeyance to await the result of his application for a discharge.

On the other hand, the creditor who has not proved his debt has no status in the court of bankruptcy. He has never submitted himself to its jurisdiction, and his right to proceed is no further affected than it is affected by the restraining words of the statute. But this restraint is, by the very terms of the statute, subject to a condition, and that condition is, that the restraint shall not exist if the bankrupt does not use reasonable diligence to obtain his discharge. "No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined, and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, *provided* there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge." Sec. 21. But the suit can only be stayed by the court in which it is pending, and only upon the condition that there has been no unreasonable delay on the part of the bankrupt. In the case, therefore, of a creditor who has not proved his debt, there is no reason for sending him into the court of bankruptcy to apply for permission to proceed. If there has been unreasonable delay the proceedings in bankruptcy do not arrest his suit, and he has a right to proceed which he has not surrendered by any act of his, and which the law has not taken away from him. Indeed, it is very doubtful whether he could be heard at all in the court of bankruptcy upon any such application until he had proved his debt. In such a case, therefore, the question of unreasonable delay must necessarily be a question to be determined by the court in which the creditors' action is pending, the court which is called upon to stay the suit.

In the present case the plaintiff, having made himself a party to the proceedings in bankruptcy by proving his debt there, could not lawfully pursue the bankrupt by an execution from this court for the same debt while the defendant's application for a discharge was pending there. If there has been unreasonable delay, his remedy is in the court of bankruptcy, which, by his own act, has acquired complete and exclusive jurisdiction of his rights. He must go there to remove the impediment which he has placed in his own path before he can proceed here. *Rule absolute.*

THE AMENDATORY BANKRUPTCY ACT.

An act to amend and supplement an act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March second, eighteen hundred and sixty-seven, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March second, eighteen hundred and sixty-seven, be, and the same is hereby, amended and supplemented as follows: "That the court may, in its discretion, on sufficient cause shown, and upon notice and hearing, direct the receiver or assignee to take possession of the property, and carry on the business of the debtor, or any part thereof, under the direction of the court, when, in its judgment, the interest of the estate as well as of the creditors will be promoted thereby, but not for a period exceeding nine months from the time the debtor shall have been declared a bankrupt: *Provided*, That such order shall not be made until the court shall be satisfied that it is approved by a majority in value of the creditors."

SEC. 2. That section one of said act be, and it is hereby, amended by adding thereto the following words: "*Provided*, That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the state where such bankrupt resides having jurisdiction of claims of such nature and amount."

SEC. 3. That section two of said act be, and it hereby is, amended by striking out, in line ten, the words "the same," and inserting the word "any;" and by adding next after the words "adverse interest," in line twelve, the words "or owing any debt to such bankrupt."

SEC. 4. That unless otherwise ordered by the court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels and at such times and places as shall be best calculated to produce the greatest amount with the least expense. All notices of public sales under this act by any assignee or officer of the court shall be published once a week for three consecutive weeks in the newspaper or newspapers, to be designated by the judge, which, in his opinion, shall be best calculated to give general notice of the sale. And the court, on the application of any party in interest, shall have complete supervisory power over such sales, including the power to set aside the same and order a resale, so that the property sold shall realize the largest sum. And the court may, in its discretion, order any real estate of the bankrupt, or any part thereof, to be sold for one fourth cash at the time of sale, and the residue within eighteen months, in such instalments as the court may direct, bearing interest at the rate of seven per centum per annum, and secured by proper mortgage or lien upon the property so sold. And it shall be the duty of every assignee to keep a regular account of all moneys received or expended by him as such assignee, to which account every creditor shall, at reasonable times, have free access. If any assignee shall fail or neglect to well and

faithfully discharge his duties in the sale or disposition of property as above contemplated, it shall be the duty of the court to remove such assignee, and he shall forfeit all fees and emoluments to which he might be entitled in connection with such sale. And if any assignee shall, in any manner, in violation of his duty aforesaid, unfairly or wrongfully sell or dispose of, or in any manner fraudulently or corruptly combine, conspire, or agree with any person or persons, with intent to unfairly or wrongfully sell or dispose of the property committed to his charge, he shall upon proof thereof be removed, and forfeit all fees or other compensation for any and all services in connection with such bankrupt's estate, and, upon conviction thereof before any court of competent jurisdiction, shall be liable to a fine of not more than ten thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both fine and imprisonment at the discretion of the court. And any person so combining, conspiring, or agreeing with such assignee for the purpose aforesaid shall, upon conviction, be liable to a like punishment. That the assignee shall report, under oath, to the court at least as often as once in three months, the condition of the estate in his charge, and the state of his accounts in detail, and at all other times when the court, on motion or otherwise, shall so order. And on any settlement of the accounts of any assignee, he shall be required to account for all interest, benefit, or advantage received, or in any manner agreed to be received, directly or indirectly, from the use, disposal, or proceeds of the bankrupt's estate. And he shall be required, upon such settlement, to make and file in court an affidavit declaring, according to the truth, whether he has or has not, as the case may be, received, or is or is not, as the case may be, to receive directly or indirectly, any interest, benefit, or advantage from the use or deposit of such funds; and such assignee may be examined orally upon the same subject, and if he shall wilfully swear falsely, either in such affidavit or examination, or to his report provided for in this section, he shall be deemed to be guilty of perjury, and, on conviction thereof, be punished by imprisonment in the penitentiary not less than one and not more than five years.

SEC. 5. That section eleven of said act be amended by striking out the words "as the warrant specifies" where they first occur, and inserting the words "as the marshal shall select, not exceeding two;" and inserting after the word "specifies" where it last occurs, the words "But whenever the creditors of the bankrupt are so numerous as to make any notice now required by law to them, by mail or otherwise, a great and disproportionate expense to the estate, the court may, in lieu thereof, in its discretion, order such notice to be given by publication in a newspaper or newspapers, to all such creditors whose claims, as reported, do not exceed the sums, respectively, of fifty dollars."

SEC. 6. That the first clause of section twenty of said act be amended by adding, at the end thereof, the words "or in cases of compulsory bankruptcy, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off."

SEC. 7. That section twenty-one of said act be amended by inserting the following words in line six, immediately after "thereby:" "But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge."

Sec. 8. That the following words shall be added to section twenty-six of said act: "That in all causes and trials arising or ordered under this act, the alleged bankrupt, and any party thereto, shall be a competent witness."

Sec. 9. That in cases of compulsory or involuntary bankruptcy, the provisions of said act, and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid such per centum of his debts, or as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one fourth of his creditors in number and one third in value; and the provision in section thirty-three of said act of March second, eighteen hundred and sixty-seven, requiring fifty per centum of such assets, is hereby repealed.

Sec. 10. That in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in section thirty-five of the act to which this is an amendment is hereby changed to two months; but this provision shall not take effect until two months after the passage of this act. And in the cases aforesaid, the period of six months mentioned in said section thirty-five is hereby changed to three months; but this provision shall not take effect until three months after the passage of this act.

Sec. 11. That section thirty-five of said act be, and the same is hereby, amended as follows: First, after the word "and," in line eleven, insert the word "knowing;" secondly, after the word "attachment," in the same line, insert the words "sequestration, seizure;" thirdly, after the word "and," in line twenty, insert the word "knowing." And nothing in said section thirty-five shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith upon a security taken in good faith on the occasion of the making of such loan.

Sec. 12. That section thirty-nine of said act of March second, eighteen hundred and sixty-seven, be amended so as to read as follows:—

"Sec. 39. That any person residing, and owing debts, as aforesaid, who, after the passage of this act, shall depart from the state, district, or territory of which he is an inhabitant, with intent to defraud his creditors; or, being absent, shall, with such intent, remain absent; or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this act; or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process; or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of the United States or of any state, district, or territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate

under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of the United States, or of such state, district, or territory applicable thereto, for a period of twenty days, or has been actually imprisoned for more than twenty days in a civil action founded on contract for the sum of one hundred dollars or upward; or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment; or who, being a banker, broker, merchant, trader, manufacturer, or miner, has stopped or suspended and not resumed payment, within a period of forty days, of his commercial paper (made or passed in the course of his business as such, or who, being a bank or banker, shall fail for forty days to pay any depositor upon demand of payment lawfully made), shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one third of the debts so provable: *Provided*, That such petition is brought within six months after such act of bankruptcy shall have been committed. And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And in all cases commenced since the first day of December, eighteen hundred and seventy-three, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one fourth in number and one third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court, if satisfied that the admission was made in good faith, shall so adjudge; which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and, in cases hereafter commenced, ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall

not answer the requirements of this section, the proceedings shall be dismissed, and, in cases hereafter commenced, with costs; and if such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned, or transferred contrary to this act: *Provided*, That the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy; and the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers. And in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned. But if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purposes aforesaid."

Sec. 13. That section forty of said act be amended by adding at the end thereof the following words: "And if, on the return-day of the order to show cause as aforesaid, the court shall be satisfied that the requirement of section thirty-nine of said act as to the number and amount of petitioning creditors has been complied with, or if, within the time provided for in section thirty-nine of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one fourth in number of the creditors and one third in the amount of the provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and in cases hereafter commenced with costs."

Sec. 14. That section forty-one of said act be amended as follows: After the word "bankruptcy," in line eight, strike out all of said section and insert the words, "Or, at the election of the debtor, the court may, in its discretion, award a *venire facias* to the marshal of the district, returnable within ten days before him for the trial of the facts set forth in the petition, at which time the trial shall be had, unless adjourned for cause. And unless, upon such hearing or trial, it shall appear to the satisfaction of said court, or of the jury, as the case may be, that the facts set forth in said petition are true, or if it shall appear that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens was the sole ground of the proceeding, the proceeding shall be dismissed, and the respondent shall recover costs; and all proceedings in bankruptcy may be discontinued on reasonable notice and hearing, with the approval of the court, and upon the assent, in writing, of such debtor, and not less than one half of his creditors in number and amount; or, in case all the creditors and such debtor assent thereto, such discontinuance shall be ordered and entered; and all parties shall be remitted, in either case, to the same

rights and duties existing at the date of the filing of the petition for bankruptcy, except so far as such estate shall have been already administered and disposed of. And the court shall have power to make all needful orders and decrees to carry the foregoing provision into effect."

SEC. 15. That section eleven of said act be amended by inserting the words "and valuation" after the word "inventory" in the twenty-first line; and that section forty-two of said act be amended by inserting the words "and valuation" after the word "inventory" in the fifteenth line.

SEC. 16. That section forty-nine of said act be amended by striking out, after the word "the," in line five, the words "supreme courts," and inserting in lieu thereof "district courts;" and in line six, after the word "states," inserting the words "subject to the general superintendence and jurisdiction conferred upon circuit courts by section two of said act."

COMPOSITION WITH CREDITORS.

SEC. 17. That the following provisions be added to section forty-three of said act: That in all cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor of the time, place, and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor. And such resolution shall, to be operative, have been passed by a majority in number and three fourths in value of the creditors of the debtor assembled at such meeting either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two thirds in number and one half in value of all the creditors of the debtor. And in calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors above the amount of such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way. And creditors whose debts are fully secured shall not be entitled to vote upon or to sign such resolution without first relinquishing such security for the benefit of the estate.

The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due.

Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied

that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times.

The creditors may, by resolution passed in the manner and under the circumstances aforesaid, add to, or vary the provisions of, any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner and proceeded with in the same way and with the same consequences as the resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.

Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.

Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice, and with the consent of a general meeting of his creditors.

Every such composition shall, subject to priorities declared in said act, provide for a *pro rata* payment or satisfaction, in money, to the creditors of such debtor in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up.

The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner and to the same extent as now provided by law in relation to proceedings in bankruptcy.

If it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and, in either case, the debtor shall be proceeded with as a bankrupt in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not, in such case, be computed in calculating periods of time prescribed by said act.

SEC. 18. That from and after the passage of this act the fees, commissions, charges, and allowances, excepting actual and necessary disbursements, of, and to be made by, the officers, agents, marshals, messengers, assignees, and registers in cases of bankruptcy, shall be reduced to one half of the fees, commissions, charges, and allowances heretofore provided for or made in like cases: *Provided*, That the preceding provision shall be and remain in force until the justices of the supreme court of the United States shall make and promulgate new rules and regulations in respect to the matters aforesaid, under the powers conferred upon them by sections ten and forty-seven of said act, and no longer, which duties they shall perform as soon as may be. And said justices shall have power under said sections, by general regulations, to simplify, and so far as in their judgment will conduce to the benefit of creditors, to consolidate the duties of the register, assignee, marshal, and clerk, and to reduce fees, costs, and charges, to the end that prolixity, delay, and unnecessary expense may be avoided. And no register or clerk of court, or any partner or clerk of such register or clerk of court, or any person having any interest with either in any fees or emoluments in bankruptcy, or with whom such register or clerk of court shall have any interest in respect to any matter in bankruptcy, shall be of counsel, solicitor, or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, or in an appeal therefrom. Nor shall they, or either of them, be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy; nor be interested, directly or indirectly, in the fees or emoluments arising from either of said trusts. And the words "except such as are established by this act or by law," in section ten of said act, are hereby repealed.

SEC. 19. That it shall be the duty of the marshal of each district, in the month of July of each year, to report to the clerk of the district court of such district, in a tabular form, to be prescribed by the justices of the supreme court of the United States, as well as such other or further information as may be required by said justices,

First, the number of cases in bankruptcy in which the warrant prescribed in section eleven of said act has come to his hands during the year ending June thirtieth, preceding;

Secondly, how many such warrants were returned, with the fees, costs, expenses, and emoluments thereof, respectively and separately;

Thirdly, the total amount of all other fees, costs, expenses, and emoluments, respectively and separately, earned or received by him during such year from or in respect of any matter in bankruptcy;

Fourthly, a summarized statement of such fees, costs, and emoluments, exclusive of actual disbursements in bankruptcy, received or earned for such year;

Fifthly, a summarized statement of all actual disbursements in such cases for such year.

And in like manner, every register shall, in the same month and for the same year, make a report to such clerk of,

First, the number of voluntary cases in bankruptcy coming before him during said year;

Secondly, the amount of assets and liabilities, as nearly as may be, of the bankrupts;

Thirdly, the amount and rate per centum of all dividends declared;

Fourthly, the disposition of all such cases;

Fifthly, the number of compulsory cases in bankruptcy coming before him, in the same way;

Sixthly, the amount of assets and liabilities, as nearly as may be, of such bankrupts;

Seventhly, the disposition of all such cases;

Eighthly, the amounts and rate per centum of all dividends declared in such cases;

Ninthly, the total amount of fees, charges, costs, and emoluments of every sort, received or earned by such register during said year in each class of cases above stated.

And in like manner, every assignee shall, during said month, make like return to such clerk of,

First, the number of voluntary and compulsory cases, respectively and separately in his charge during said year;

Secondly, the amount of assets and liabilities therein, respectively and separately;

Thirdly, the total receipts and disbursements therein, respectively and separately;

Fourthly, the amount of dividends paid or declared, and the rate per centum thereof, in each class, respectively and separately;

Fifthly, the total amount of all his fees, charges, and emoluments, of every kind therein, earned or received;

Sixthly, the total amount of expenses incurred by him for legal proceedings and counsel fees;

Seventhly, the disposition of the cases respectively;

Eighthly, a summarized statement of both classes as aforesaid.

And in like manner, the clerk of said court, in the month of August, in each year, shall make up a statement for such year, ending June thirtieth, of,

First, all cases in bankruptcy pending at the beginning of the said year;

Secondly, all of such cases disposed of;

Thirdly, all dividends declared therein;

Fourthly, the number of reports made from each assignee therein;

Fifthly, the disposition of all such cases;

Sixthly, the number of assignees' accounts filed and settled;

Seventhly, whether any marshal, register, or assignee has failed to make and file with such clerk the reports by this act required, and, if any have failed to make such reports, their respective names and residences.

And such clerk shall report in respect of all cases begun during said year.

And he shall make a classified statement, in tabular form, of all his fees, charges, costs, and emoluments, respectively, earned or accrued during said year, giving each head under which the same accrued, and also the sum of all moneys paid into and disbursed out of court in bankruptcy, and the balance in hand or on deposit.

And all the statements and reports herein required shall be under oath, and signed by the persons respectively making the same.

And said clerk shall, in said month of August, transmit every such statement and report so filed with him, together with his own statement and report aforesaid, to the attorney general of the United States.

Any person who shall violate the provisions of this section shall, on motion made, under the direction of the attorney general, be by the district court dismissed from his office, and shall be deemed guilty of a misdemeanor, and, on conviction thereof, be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding one year.

SEC. 20. That in addition to the officers now authorized to take proof of debts against the estate of a bankrupt, notaries public are hereby authorized to take such proof, in the manner and under the regulations provided by law; such proof to be certified by the notary and attested by his signature and official seal.

SEC. 21. That all acts and parts of acts inconsistent with the provisions of this act be, and the same are hereby, repealed.

APPROVED, *June* 22, 1874.

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☞ The numbers refer to the *sections* of the act.

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NOTES OF NEW BOOKS.

IN the preparation and publication of the Statutes of Illinois for the session of 1873-74, WM. L. GROSS, Esq., has achieved as pronounced a success as can be found in the history of American law book making. The legislature rose on the 30th of March and the volume was ready for delivery by the first of June, while the laws it contained went into force on the first of July. The book embraces what is tantamount to nearly a thousand ordinary pages, and from first to last gives evidence of conscientious and intelligent labor. It has honest marginal notes, a full index and other essentials, all well done, and is, mechanically, unexceptionable. Its production, under the circumstances, is a happy vindication of American enterprise.

THE PROFESSION will be gratified to learn that Messrs. W. H. & O. H. Morrison, of Washington, are about to bring out a continuation of *Curtis's Decisions*, to be edited by Mr. Justice Miller.

A WORK on extraordinary remedies, including Mandamus, by Jas. L. High, Esq., will shortly be issued by Messrs. Callaghan & Co. of Chicago.

MESSRS. BAKER, VOORHIS & Co. of New York have ready an enlarged and revised edition, the sixth, of *Sedgwick on Damages*.

The same house have in preparation a new edition of *Sedgwick on the Construction of Statutes*, with notes by John Norton Pomeroy, LL. D.

JOHN D. PARSONS, Esq., of Albany, announces a work on *Nuisances*, by H. G. Wood, Esq.

THE AMERICAN LAW TIMES.

NEW SERIES. — AUGUST, 1874. — VOL. I., NO. 8.

DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. ..... *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & Co.
Am. Law Rec. ..... *American Law Record*, Cincinnati, O., H. M. MOOS.
Am. Law Reg. ..... *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & Co.
Cent. L. J. ..... *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.
Chicago L. N. ..... *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS Co.
Daily Reg. ..... *Daily Register*, New York, 303 BROADWAY, N. Y.
Ins. L. J. ..... *Insurance Law Journal*, New York, C. C. HINE, 176 BROADWAY.
Int. Rev. Rec. ..... *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
Leg. Chron. ..... *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
Leg. Gazette ..... *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.
Leg. Int. ..... *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
Mo. West. Jur. ..... *Monthly Western Jurist*, Bloomington, Ill., THOMAS F. TIPTON.
Pac. Law Rep. ..... *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
Pittsb. L. J. ..... *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
West. Jur. ..... *Western Jurist*, Des Moines, Iowa, MILLS & Co.

ASSESSMENT.

ASSESSMENT BY OFFICER IRREGULARLY ELECTED. — Certain land situated in Fairview Township was sold for the taxes of 1867 to defendant, and a deed made therefor. As the law then stood, in addition to township assessors, there was chosen by each incorporated town at its municipal election an assessor, who listed all property within its limits. The township assessors were elected at the general election for state and county officers. The incorporated town of Anamosa is in Fairview Township. At the general election of 1866, one Arnold was elected assessor of Fairview Township, and one Dott, at the same election, and not at a munici-

pal election, was chosen assessor of Anamosa, and gave bond and took the oath of office as required by law. Both of these assessors were voted for by all the electors of the township, including those who lived within the limits of the town of Anamosa. From 1863 until after the assessment of the taxes in question, it was the custom of the assessor of Anamosa to list the land outside the town, the land in controversy among others, and no objection had ever been made. *Held*, that the assessments so made were void. *Burley* v. *Fisher*, West. Jur., June, 1874.

BANKRUPTCY.

1. JURISDICTION OF UNITED STATES SUPREME COURT. — A creditor opposed the discharge of a voluntary petitioner and was overruled by the district court, whereupon he filed a petition of appeal to the circuit court, and the decree below was affirmed. Upon appeal to the supreme court, it was held that the case could not go beyond the circuit court. *Coit* v. *Robinson & Chamberlain*, Leg. Gazette, June 12, 1874.

2. ABSCONDING DEBTOR. — HOMESTEAD EXEMPTION. — A bankrupt absconded and was subsequently proceeded against by petition of creditors and duly adjudged a bankrupt. His wife, who remained in the State, was dispossessed of the homestead by the assignee. It appearing that the homestead in question was owned by the bankrupt, and occupied by his family after he had absconded, it was ordered that the same be restored to the wife. *In re Pratt*, Cent. L. J., June 11, 1874.

CIRCULAR.

SENDING CIRCULAR. — OFFER TO SELL. — The defendants sent to plaintiffs a circular stating "Our present price for blue seat springs is," &c. Upon receipt of the circular, three days after it was mailed, plaintiff ordered a reasonable number of springs which defendants did not deliver. Subsequently plaintiff sued for breach of the contract. The court instructed the jury that sending the circular was an offer to sell at the price stated, which, having been accepted by plaintiff, a contract was entered into for the infraction of which defendants were liable. *Hall* v. *Kimbark*, Chicago L. N., June 13, 1874.

CONFISCATION ACT.

PROCEEDINGS UNDER, ETC. — The proceedings under sections 5, 6, and 7 of the Confiscation Act are proceedings *in rem*. Discussion of the act and of the practice thereunder by Mr. Justice Strong, writing for the supreme court of the United States. *U. S.* v. *Executor of Slidell et al.* Chicago L. N., May 30, 1874.

CONSTRUCTION OF STATUTES.

1. SPECIAL ACT. — INTEREST WHERE DEBT IS PAYABLE ELSEWHERE THAN WHERE MADE. — A railroad company was incorporated in Ohio by special act, one section of which provided that the company should have power, on the credit of the company, to borrow money, not exceeding in amount the amount of capital stock by this act authorized, and at a rate not exceeding seven per cent. per annum; and, for the purpose of perfect-

ing said loan, the directors of said company shall have power, in the name of the company, to make and execute such bonds, promissory notes, or other evidences of debt, and payable *at such times and places* as shall be agreed upon by the respective parties so contracting, which . . . . may be made transferable and *redeemable*, in such *form* and at such *times* and *places* as may be therein designated.

Subsequently, by another special act, the city of Cincinnati was authorized to loan the said railroad company a sum of money "upon such terms, conditions, and limitations as might be determined upon by the city council." A loan was accordingly duly made to the company, the council taking the company's bonds bearing interest at six per cent. and payable in New York, but reserving interest at the rate of seven per cent., six per cent. being the legal rate. *Held*, that the city was authorized to make the loan. *H. & C. R. R. Co.* v. *Cincinnati*, Am. Law Rec., June, 1874.

2. ADOPTION OF STATUTE OF ANOTHER STATE. — When the legislature of a state adopts the statute of another state it adopts, also, the constructions previously given it by the courts of such state, unless such constructions are clearly untenable. *Streater* v. *The People*, Mo. West. Jur., June, 1874.

CONTRACT.

See CIRCULAR; EVIDENCE, 4; MISTAKE; MORTGAGE.

CORPORATION.

LIABILITY OF OFFICES OF, AS TRUSTEES. — In respect to the property of the corporation, whether it be land, money, securities, capital stock, or other property held by the corporation, and the management of its business, the directors are trustees for the stockholders. The relation of trustee and *cestui que trust* exists wherever the action of the directors affects the whole body of the stockholders.

IN THE PURCHASE OF STOCK by a director from the holder, the relation of trustee and *cestui que trust* does not exist, as in such case the stock is wholly beyond the dominion and control of the director, and he has no duty to discharge in reference to it other than the duty devolving upon him to manage prudently the affairs and property of the corporation itself. *Commissioners of Tippecanoe Co.* v. *Reynolds*, Am. Law. Reg., June, 1874.

COUNTERFEIT NOTE.

DILIGENCE IN ASCERTAINING CHARACTER OF NOTE. — Where it appeared that the plaintiff had kept a treasury note, that he alleged to be counterfeit, upon his person for five months without attempting to ascertain the true nature of the note, although cognizant of facts sufficient to put him upon inquiry, it was held that he could not recover, the lack of diligence being sufficient to debar his right of action. *Atwood* v. *Cornwall*, Am. Law Reg., April, 1874.

See EVIDENCE, 1.

CRIMINAL LAW.

1. POSSESSION OF STOLEN PROPERTY is a circumstance of weight,

but is not enough of itself to warrant a conviction. *People* v. *Noregea*, Pac. Law Rep., May 5, 1874.

2. RECEIVING MONEY known to have been obtained by robbery does not constitute robbery. *People* v. *Shepardson*, Pac. Law Rep., May 12, 1874.

3. MURDER IN THE SECOND DEGREE. — The court charged the jury as follows: "If you believe from the evidence that the killing was unlawful, accompanied with malice, but not deliberate and premeditated, your verdict will be murder in the second degree." *Held*, not to be error. *People* v. *Doyell*, Pac. Law Rep., May 5, 1874.

4. CHARGE OF COURT IN CRIMINAL CASES. — HOMICIDE. — Counsel for the defendant requested the court to charge: "If, under the instructions given you, you shall find that the wood in dispute between the defendant and the deceased, at the time of the killing, was the property of the defendant, then the defendant was not required by law to deliver or give up the possession of said wood to Black, the deceased, in order to prevent such personal conflict as might be necessary to defend his possession; but, on the contrary, the defendant had a right to defend his possession of said wood against any forcible attempt of Black to take it from him, and, if necessary for that purpose, had a right to kill Black; for the owner of personal property in his possession has a right to use such force as is necessary to prevent the forcible taking of it from his possession by one not entitled to the possession of it."

The court gave the instruction as asked, with the addition following: "If, however, the alleged trespass is unaccompanied by any felonious attempt, the law does not admit the force of the provocation to be sufficient to warrant the owner to make use, in repelling the trespass, of a deadly weapon; and if, under such circumstances, the owner of the property with a deadly weapon slays the trespasser, the owner is guilty of murder."

The defendant excepts to that portion of the instruction added by the court, because it declares that nothing short of an attempt to commit a felony can be admitted as a sufficient provocation to reduce the homicide below murder. *Held*, that the instruction, as originally drawn, assumed that the defendant was acting in self-defence, with full possession of his faculties and control of his temper. It was addressed to the question of *justification*, and not to the gross provocation and irresistible passion which enter into the definition of manslaughter. The proviso, added by the court, simply announced that, in a certain event, the defendant would still be guilty of murder, notwithstanding the general proposition contained in the instruction as prepared by counsel.

ESTOPPEL.

MUNICIPAL OFFICERS are powerless to bind the public so as to work an estoppel. *Clements* v. *Hamilton County*, Am. Law Rec., June, 1874.

See HUSBAND AND WIFE, 3.

EVIDENCE.

1. AS TO GENUINENESS OF TREASURY NOTE. — Bankers are compe-

tent to testify as experts to determine the genuineness of a treasury note. The opinions of persons through whose hands it has passed may, however, be inadmissible. *Atwood* v. *Cornwall*, Am. Law. Reg., April, 1874.

2. OPINIONS AS TO QUALITY are incompetent unless there be fraud or warranty. *Whitaker* v. *Eastwick*, Leg. Int., May 22, 1874.

3. EJECTION FROM CAR ON RAILROAD. — OFFER TO PAY UPON SURRENDER OF TICKET. — A party purchased a ticket to a particular place, before arriving at which he voluntarily left the train without informing the conductor of any intention to continue the journey to the place named on the ticket. Several days afterward he attempted to ride upon the ticket to the place named, upon another train, the conductor of which took up the ticket and put the party off. In an action for damages, the exclusion of evidence that the party offered to pay upon a surrender of his ticket was held to be error. *Vankirk* v. *Penn. R. R. Co.*, Leg. Gazette, May 29, 1874.

4. DECLARATIONS OF TICKET AGENT AFTER SALE OF TICKET. — Evidence of the declarations of a ticket agent as to a party's right to ride upon a ticket which the agent had sold, held to be inadmissible as evidence of a contract, but not inadmissible as evidence of the good faith of the party in his claim to ride upon the ticket. *Ib.*

5. PARTY ON RAILROAD PERMITTED TO RIDE PAST STATIONS. — PUTTING PARTY OFF BETWEEN STATIONS. — The conductor having suffered the plaintiff to ride past several stations before ejecting him, and then having put him out, remote from any shelter, and in a severe storm; it was *held*, that those circumstances might be considered by the jury in deciding whether the conductor intentionally selected an inhospitable spot, or whether it happened to be the locality of the plaintiff's persistent refusal to pay. *Ib.*

6. AFFIRMATIVE PROOF TO REBUT EVIDENCE OF DIFFERENT STATEMENTS OUT OF COURT. — When an attempt is made to impeach a witness by proving former contradictory statements, he may be supported by evidence that he has made to other persons declarations consistent with his testimony. Such is the law of Indiana, and perhaps of Pennsylvania and North Carolina. In New York, as in England, after much uncertainty, the rule seems now to be settled that such evidence is ordinarily inadmissible; and in others of the states it is rejected. The best elementary writers reach the conclusion that the evidence is to be received only in exceptional cases. *People* v. *Doyell*, Pac. Law. Rep., May 5, 1874.

7. DECLARATIONS OF DECEASED PARTY. — A shipmaster and owner procured a marine insurance policy upon his one quarter of his vessel "on account of whom it may concern;" loss payable to himself. The vessel was lost during the voyage covered by the policy, with the master and all on board. The plaintiff, a creditor of the deceased master, brought this action upon the policy, claiming that it was obtained for his benefit. He introduced testimony of the declarations of the deceased that if the plaintiff would make him a loan he would secure him by a policy on this vessel; and subsequent declarations that the loan had been made to him by the plaintiff, and that he had secured the plaintiff by procuring a policy for his benefit. *Held*, that this testimony was inadmissible without proof that the deceased was acting as plaintiff's agent in effecting the insurance,

and that the declarations themselves were not competent for this purpose. *Sleeper* v. *Union Ins. Co.*, Ins. L. J., June, 1874.

8. LEGAL PRACTITIONERS are competent as experts to prove the regularity of a judgment obtained in one state in a trial in another. *Crafts* v. *Clark*, West. Jur., June, 1874.

See HUSBAND AND WIFE, 1, 4; INSURANCE, 1, 2.

HOMESTEAD EXEMPTION.

1. THE MISSISSIPPI STATUTE of 1865 held to be unconstitutional in so far as it applies to debts created before its passage. *Lasly* v. *Phipps*, Am. Law Reg., April, 1874.

2. CONSTRUCTION of the Homestead Act of Missouri, and discussion of the nature of homestead exemptions and the laws which relate thereto. *Volger* v. *Montgomery*, Am. Law Reg., April, 1874.

See BANKRUPTCY, 2.

HUSBAND AND WIFE.

1. HUSBAND NOT COMPETENT WITNESS. — In Wisconsin the husband is not competent as a witness for his wife; this incompetency rests on grounds of public policy, and is not removed by the statute removing the disqualification of interest. *In re Jones*, Chicago L. N., May 16, 1874.

2. SECURITIES TAKEN IN WIFE'S NAME will not pass to her as her separate property, if they were so drawn simply for convenience: it must clearly appear that they were intended as a settlement upon her. Where such securities are used and collected by the husband with the wife's consent, this conduct disproves the claim that they were intended as a settlement upon her.

The wife having allowed the husband to enjoy the credit of such securities and their proceeds, cannot afterwards claim them as against creditors who have trusted him on the faith of such apparent ownership. *Ib.*

3. ESTOPPEL. — If the wife joins the husband when embarrassed in conveying his property to their children, making no claims for herself, she cannot afterwards set up a claim when such conveyances are about to be set aside. *Ib.*

4. CREDIBILITY OF WIFE'S TESTIMONY. — Where the wife's testimony is defective and contradictory, particularly about the most material matters, her statements as to the amount of her claim should be looked upon with suspicion. *Ib.*

5. OPERATION OF PROPERTY ACT ON VESTED RIGHTS. — A note given to the wife for money loaned by her while unmarried, and prior to the passage of the Married Woman's Property Act, passes to the husband under the common law rule, and his vested interest therein cannot be abrogated by any subsequent act of the legislature; and though he receives the money thereon she cannot prove the amount against him as a debt in bankruptcy. *Ib.*

6. RECEIPT OF INCOME OF WIFE'S ESTATE. — A married woman may bestow upon her husband the *income* of her separate estate; and where the husband, with the consent of the wife, is in the habit of receiving such income and profits, her voluntary choice to thus dispose of them for the

use and benefit of the family is sufficiently apparent, and the husband will not be required to account therefor beyond the amount received during the last year.

A claim founded upon such receipt of income and profits will not be allowed against the husband's estate. *Ib.*

See BANKRUPTCY 2; INJUNCTION.

INJUNCTION

WILL NOT BE GRANTED TO RESTRAIN SHERIFF'S SALE TO TEST TITLE. — The plaintiff, a married woman, filed her bill, setting forth her title to real estate purchased with her separate money, &c., and praying for an injunction to restrain a sale of the same under an execution upon a judgment against her husband. *Held*, that an injunction could not be granted, the purpose of the sale being to test the wife's title. *Shuster* v. *Bennett*, Leg. Int., June 26, 1874.

INSURANCE.

1. INADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN POLICY. — Where two parties have entered into a written contract, all previous negotiation and propositions in relation to such contract, whether parol or written, are to be regarded as merged in the final agreement. Such preliminary matter may sometimes be admissible, under the rule which admits evidence of the surrounding circumstances for the purpose of explaining an ambiguous expression, but never when the terms of the contract are clear and explicit. The legal inference in all such cases, if the contract varies from what has been previously said or written, is, that the parties upon further consideration have changed their views. Policies of insurance are no exception to this rule. *King* v. *Ent. F. & M. Ins. Co.*, Ins. L. J., May, 1874.

2. INADMISSIBILITY OF PROOF OF CUSTOM TO EXPLAIN POLICY. — *Held*, that it was error to permit the introduction of evidence of the custom of another company to explain a written contract of insurance. *Ib.*

3. REINSURANCE. — LIABILITY OF REINSURER IN CASE OF NON-PAYMENT BY FIRST COMPANY. — A policy of reinsurance contained the words, "Loss, if any, payable at the same time and *pro rata* with the assured:" *Held*, that the reinsurer was bound to pay the full amount for which the first insurer was liable, and that the fact of bankruptcy and payment of less than the full sum of the policy by the first insurer did not affect the reinsurer's liability. *In re Republic Ins. Co.*, Ins. L. J., May, 1874.

4. MARINE INSURANCE. — TOTAL AND PARTIAL LOSS DEFINED. — In order to constitute a total loss it is not necessary that there shall be a complete destruction of the thing insured. A total loss may occur where parts of the thing insured remain. Thus, where more than half the parts of a sugar-packing machine were delivered to the insured, but no part in a condition in which it was capable of use, it was held there was a total loss. *Great Western Ins. Co.* v. *Fogarty*, Albany L. J., June 6, 1874.

5. LIFE INSURANCE. — ONE WHO DIES INSOLVENT can make no

testamentary disposition of the fund accruing from an insurance policy upon his life if he leave neither widow nor child; in such event the fund becomes assets to be applied to the payment of debts. *Hathaway* v. *Sherman*, Ins. L. J., June, 1874.

6. DESCRIPTION OF PROPERTY. — The property was described as "contained in letter C, Patterson's Stores, South Front, below Pine Street, Philadelphia." *Held*, that "letter C, Patterson's stores," &c., having a technical meaning, was a sufficient description. *Bryce* v. *Lorillard Fire Ins. Co.* Ib.

7. WHERE PREMIUMS ARE PAID BY A THIRD PARTY who is not a party to the contract of insurance, an action cannot be maintained by him in his own name to recover them back. *No. American Life Ins. Co.* v. *Wilson*, Ins. L. J., June, 1874.

8. FAILURE OF FOREIGN COMPANY TO COMPLY WITH STATE REGULATIONS DOES NOT AFFECT POLICY. — A life policy issued by a foreign insurance company is not rendered void by the neglect of the company to comply with the provisions of the act of April 16th, 1867, providing for the incorporation and regulation of insurance companies; nor will such neglect in an action brought against the company on the policy release the policy holder from paying premiums according to the terms of the policy. *Union Mut. Life Ins. Co* v. *McMillen*, Ins. L. J., June, 1874.

9. WAIVER OF FORFEITURE. — AGENCY. — ANTEDATED RECEIPT, ETC. — When a life policy is made and accepted upon the express condition that if the annual premium is not fully paid within the time specified the policy "shall be null and void and wholly forfeited," the failure to pay the premium avoids the policy.

When the policy also provides that no agent of the company, except the president and secretary, can waive such forfeiture, authority conferred upon an agent before the premiums become due, to collect them, does not impliedly invest him with authority to waive the forfeiture.

Notwithstanding the limitation upon the power of agents declared in the policy in respect to waiving the forfeiture, the company is competent to invest such authority in any of its agents. The authority may be express, or it may be implied from circumstances; but the burden of showing it in either case is on the party claiming its exercise.

An agent having no authority to waive the forfeiture, acting in the interest of the assured, received the unpaid part of a premium on a forfeited policy after the life insured had ended, for which he gave a receipt antedated, and forwarded the money to the company, concealing the facts as to such payment. *Held*, that the receiving of the money by the company in ignorance of such facts was no ratification of the act of the agent in receiving the money.

The fact that the company, on tendering back the money so received, omitted to return certain notes given in part payment of premiums, but which the forfeiture of the policy rendered uncollectable, will not affect the rights of the parties in a suit on the policy; nor is the fact that the notes are payable to order material, where they show on their face the consideration for which they were given. *Ib.*

See EVIDENCE, 7.

INTEREST.

RATE OF INTEREST UPON FOREIGN JUDGMENT. — If there be no evidence of the rate of interest allowed upon a foreign judgment, the rate prescribed by the law of the state where the case is tried will be adopted. *Crafts* v. *Clark*, West. Jur., June, 1874.

See CONSTRUCTION OF STATUTES, 1.

INTERNAL REVENUE.

GOVERNMENT MUST MAKE OUT PRIMA FACIE CASE. — Where defendants, in an action under the Internal Revenue Laws, failed to produce certain books which would, presumably, have disclosed that *primâ facie* case against them was susceptible of explanation, the court below instructed the jury as follows: "The proof in the outset may be defective. It may not be sufficient to enable you, without any doubt or hesitation, to find against the defendants, and still it may be your duty, nevertheless, so to find; for although I instruct you that the case must be made out beyond all reasonable doubt in this, as well as in criminal cases, yet the course of the defendants may have supplied, in the presumptions of law, all which this stringent rule demands. In determining, therefore, in the outset, whether a case is established by the government, you will dismiss from your minds the perplexing question, whether it is so made out beyond all doubt. It needs not, in the exigencies of this case, be so proved in order to throw the burden of explanation upon the defendant, if from the facts you believe he has within his reach that power. In the end, all reasonable doubt must be removed; but here, at this stage, you need say only, 'Is the case so far established as to call for explanation?'" . . . . *Held*, that there was error; that the government was required to make out its case beyond a reasonable doubt. *Chaffee & Co.* v. *U. S.*, Leg. Gazette, June 26, 1874.

See TAXATION, 1, 3.

JUDICIAL SALE.

See INJUNCTION.

JURISDICTION.

1. PRESUMPTIONS AS TO, discussed in respect of judgments, recitals of the record, &c., by Mr. Justice Field, delivering the opinion of the supreme court of the United States. *Calpin* v. *Page*, Chicago L. N., June 13, 1874.

2. OF UNITED STATES COURT TO ISSUE MANDAMUS UNDER ACT OF MARCH 3, 1873, TOUCHING PACIFIC R. R. CO. — The act of March 3, 1873 (17 Stats. at Large, 509), give to the proper circuit court jurisdiction in mandamus to compel the Union Pacific Railroad Company to operate its road as required by law. There must be jurisdiction over the company by service upon it to enable the court to exercise the power conferred by the act.

Whether the circuit court for the district of Iowa can acquire jurisdiction over the company under this act, *quære?*

Private persons who suffer damage and inconvenience from the failure of the company to operate its road as required by law, may institute proceedings under the act of March 3, 1873, *supra*, without the sanction of the attorney general.

Cases in which the attorney general must, and in which private citizens may apply for the writ considered. *Hall* v. *U. P. R. R. Co.*, Chicago L. N., June 13, 1874; Cent. L. J., June 11, 1874.

See BANKRUPTCY, 1; LOUISIANA.

LIFE INSURANCE.

See INSURANCE, 5, 7, 8, 9.

LOUISIANA.

THE PROVISIONAL COURT OF LOUISIANA, established by the President on the 20th of October, 1862, was in the rightful exercise of its jurisdiction on the 3d of June, 1865. The said court was dissolved on the 28th of July, 1866. *Burke* v. *Tregre*, Chicago, L. N., June 20, 1873.

MANDAMUS.

THE GOVERNOR OF A STATE cannot be compelled by mandamus to perform an official act, even if the act is a duty imposed by statute and private rights are affected. Cooley, J., *People* v. *Bagley*, Cent. L. J., June 18, 1874.

See JURISDICTION, 2.

MARRIED WOMAN.

See BANKRUPTCY, 2; HUSBAND AND WIFE; STATE DECISIONS.

MISTAKE.

WHEN EQUITY WILL CORRECT.—The mistake which will warrant a court of equity to reform a contract in writing must be one made by both parties to the agreement, so that the intentions of neither are expressed in it; or it must be the mistake of one party, by which his intentions have failed of correct expression, and there must be fraud in the other party in taking advantage of that mistake, and obtaining a contract with the knowledge that the one dealing with him is in error in regard to what are its terms. *Bryce* v. *Lorillard Fire Ins. Co.*, Ins. L. J., June, 1874.

MORTGAGE.

A paper recited that A held certain land by agreement; that B agreed to advance to A two sums of $500 and $600 to pay the purchase money due C and D from A, and that A agreed that the title of the land should be transferred to B, and held by him, until A paid the $1,100 to B, and that B should thereupon convey the land to A. *Held*, that the paper was a mortgage. *May* v. *Fepler*, Leg. Gazette, June 19, 1874.

MUNICIPAL CORPORATION.

See ESTOPPEL; ULTRA VIRES.

NEGLIGENCE.

1. STREET RAILWAY. — INJURY TO BOY FROM JUMPING FROM CAR.— It appearing that a street railway company permitted the front door of its car, upon which the plaintiff, a boy ten years of age, was being carried, to remain open, and the passage-way and rear platform to be crowded, while no fender was provided for the front platform, and that plaintiff was injured by jumping from the front platform while the car was in motion, the court refused to charge that, as a matter of law, there was no negligence on the part of the company, or that there was contributory negligence on the part of the plaintiff, but left both questions to the jury. *Held*, not to be error. *Phila. City Pass. R. W. Co.* v. *Hassard*, Leg. Int. June 19, 1874; Leg. Gazette, June 12, 1874.

2. VIS MAJOR. — Where defendant's horses became frightened by a locomotive, while defendant was driving upon a highway, and by reason of such fright became unmanageable and ran against and broke a post upon plaintiff's land, and it appeared that defendant had exercised reasonable care and skill in driving prior to the horses becoming frightened, and had not subsequently been guilty of negligence, it was held that defendant could not be held for the injury. *Brown* v. *Collins*, Am. Law Reg., June, 1874.

See COUNTERFEIT NOTE.

NUISANCE.

AN ILLEGAL TRAFFIC IN INTOXICATING LIQUORS may be rightly regarded as a nuisance which the legislature of a state has power to direct the abatemant of as such. *Streator* v. *The People*, Mo. West. Jur., June, 1874.

PACIFIC RAILROAD.

See JURISDICTION, 2.

PLEADING AND PRACTICE.

THE ACTION OF DEBT FOR STATUTORY PENALTY DEFINED AND DISTINGUISHED.—The action of debt lies for a statutory penalty because the sum demanded is certain, and is, in fact, founded upon a tort. The necessity of establishing a joint liability in such cases does not exist; it is enough if the liabilities of any of the defendants are shown. Judgment may be entered against them and in favor of the others, whose complicity in the offence for which the penalty is prescribed is not proved, as if the action were in form as well as in substance *ex delicto*. *Chaffee & Co.* v. *U. S.*, Leg. Gazette, June 26, 1874.

See CONFISCATION ACT; INSURANCE, 7; INTERNAL REVENUE.

PUBLIC SALE.

OF UNOPENED PACKAGES BY EXPRESS COMPANY. — A sale of packages without opening them so that the contents can be seen is not a lawful sale within the meaning of the statute which provides that the property shall be "exposed." *Adams Express Co.* v *Schlessinger*, Leg. Gazette, June 12, 1874.

RAILROAD.

See CONSTRUCTION OF STATUTES, 1; EVIDENCE, 3, 4, 5.

SPECIAL ACT.

See CONSTRUCTION OF STATUTES.

STATE DECISIONS.

HOW FAR U. S. COURTS WILL BE BOUND BY. — Whether or not a married woman has power to mortgage her separate estate to secure a debt of her husband, is a question in the determination of which a federal court will be bound by the constructions of a state court, the question depending upon the construction of a state statute. *Mitchell* v. *Lippincott & Co.*, Cent. L. J., May 28, 1874.

See CONSTRUCTION OF STATUTES, 2.

STATE SOVEREIGNTY.

TREATY STIPULATIONS. — RIGHT OF STATE OVER ITS OWN TERRITORY. — A treaty with a tribe of Indians living in Minnesota, made after the admission of the State to the Union, contained a stipulation in the following words: —

"The laws of the United States now in force, or that may hereafter be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect throughout the country hereby ceded, until otherwise directed by Congress or the President of the United States."

Certain spirituous liquors, illegally introduced into the territory covered by the stipulation, were seized in pursuance of law and duly libelled. The court held, sustaining a demurrer, that the territory where the liquors were seized being an organized county in the State of Minnesota, without the consent of said State the stipulations of the treaty cited were inoperative to the extent of demanding the forfeiture. *U. S.* v. *Forty-three Gallons of Whiskey, &c.*, Int. Rev. Rec., May 18, 1874.

TAXATION.

1. INTERNAL REVENUE. — CONSTRUCTION OF ACT OF JUNE 30, 1864, AS TO WHOLESALE DEALERS. — Where a manufacturer sells by sample at an agency he is not liable to be taxed as a wholesale dealer, as provided in section 79 of the act of June 30, 1864, and the amendatory act of July 13, 1866. *Tucker* v. *Slack*, Int. Rev. Rec., May 11, 1874.

2. TAX UPON CORPORATION. — REGULATION OF COMMERCE. — *Held*, that a state statute that imposed a tax upon the earnings of a railroad

company, with a proviso that where the railroad lay partly in and partly out of the state, the tax should be proportioned accordingly, was not unconstitutional as being a regulation of commerce or otherwise, but was merely a tax upon the corporation. *Minot v. P. W. & B. R. R.*, Chicago L. N., May 16, 1874.

3. TAXES WERE ASSESSED UPON DIVIDENDS declared by an insurance company on earnings which had accrued to the company between July 5, 1869, and June 30, 1870. *Held*, that the tax was valid. *Stockdale* v. *Atlantic Ins. Co.*, Albany, L. J., June 13, 1874; Int. Rev. Rec., June 1, 1874.

TRUST DEED.

See VOLUNTARY CONVEYANCE.

ULTRA VIRES.

SALE OF INTOXICATING LIQUORS. — POWER OF MUNICIPAL CORPORATION. — A provision in the charter of a city authorized the common council to declare the selling, giving away, or keeping for sale of spirituous or intoxicating liquors in the city a nuisance.

An ordinance was passed which authorized a police magistrate, upon complaint that any person had liquor for sale to the amount of more than one gallon, to issue his warrant for the search of the person's dwelling, &c. *Held*, that the ordinance was *ultra vires* and void. *Sullivan* v. *City of Oneida*, Mo. West. Jur. June, 1874.

UNITED STATES.

LIABILITY OF THE UNITED STATES FOR FORGED OR FRAUDULENT BONDS CONSIDERED. — Under the act of Congress of April 12th, 1866, which authorized the secretary of the treasury to dispose of bonds, "the proceeds thereof to be used for retiring treasury notes, or other obligations issued under any act of Congress, but nothing herein contained shall be construed to authorize any increase of the public debt," the assistant treasurer at New York having purchased, for retiring, certain 7-30 treasury notes, not yet due, which, being sent to Washington, were returned as forged and counterfeit and not issued by the United States, suit was brought by the government to recover back the money paid for the notes. Evidence was given on the trial, insisted on by the defendants, as tending to show that the notes were printed from the genuine plates and sealed with the genuine seal of the treasury department. *Held*, if the notes were in fact wholly forged and counterfeit the assistant treasurer had no authority to purchase them, and the plaintiffs were entitled to recover.

The government is not estopped, by the purchase and payment, from recovering back the money, not only because the government is not, in general, bound by the negligence of its officers, acting under a limited authority, but also because the defendants could, by refunding the money, be placed in the same situation, as they were before the transaction.

The case bears no just analogy to the acceptance or payment of a forged bill of exchange, by the drawee thereof, in which case the holder acts in faith of the drawee's acceptance or payment, and is disarmed of his usual

recourse to prior parties. There the drawee is estopped from setting up a state of facts which would practically operate as a fraud on the holder.

The decision in the *Bank of the United States* v. *Bank of Georgia* (10 Wheat. 334), holding a bank concluded by receiving its own bank bills which had been fraudulently altered, and crediting them as cash, seems to have depended upon the special circumstances of that case.

Neither that nor other cases establish that an agent, having authority to retire genuine notes of his principal, not yet due, can conclude his principal by purchasing forged notes; still less that the government can be concluded by such an unauthorized act of a subordinate officer.

There is no material difference, in this respect, between this case and any other purchase, by an agent, where a mutual mistake of fact is discovered after payment of the consideration. *Jay Cooke et al.* v. *U. S.*, Int. Rev. Rec., June 1 and 8, 1874.

VOLUNTARY CONVEYANCE.

TRUST DEED MAY BE SET ASIDE IN EQUITY. — It appearing that a voluntary deed of trust, which did not reserve a power of revocation, the consideration of which was nominal, which was given without legal advice, and misunderstood by the grantor, was set aside and cancelled, notwithstanding that the grantor's infant children were beneficiaries under the deed.

Runyon, Chancellor, writes: "In *Villers* v. *Beaumont*, decided in 1682, the lord chancellor said: 'If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this court will not loose the fetters he hath put on himself, but he must lie down under his own folly.' Recent cases, however, have narrowed the doctrine, and have held not only that the absence of a power of revocation throws on the person seeking to uphold the settlement the burden of proving that such a power was intentionally excluded by the settlor, and that in the absence of such proof the settlement may be set aside, but that equity will set aside the settlement on the application of the settlor where it appears that he did not intend to make it irrevocable, or where the settlement would be unreasonable or improvident for the lack of a provision for revocation. . . . . It is not necessary, however, to rest a decision of this case adverse to the deed on so narrow a foundation as the mere absence of a power of revocation. The circumstances under which a voluntary deed was executed may be shown, with a view to impeaching its validity, and if it appears that it was fraudulent or improperly obtained, equity will decree that it be given up and cancelled. *Garnsey* v. *Mundy*, Am. Law Reg., June, 1874.

VOLUNTARY PAYMENT.

BY WIDOW FOR MEDICAL SERVICES. — A widow who voluntarily pays for medical attendance upon her deceased husband cannot recover the amount paid against his estate. *France's App.*, Leg. Gazette, May 29, 1874; Leg. Int., May 29, 1874.

COMMISSION OF APPEALS OF NEW YORK.

[JANUARY, 1874.]

READING PAMPHLET NOT INTRODUCED IN EVIDENCE TO JURY.

KOELGES v. *GUARDIAN MUTUAL LIFE INS. CO.*

Upon the trial of a case the plaintiff proved that a certain pamphlet had been issued but did not introduce it in evidence. In his address to the jury he was permitted to read from it, to which defendant objected. Held, that there was error and ground for reversal in the appellate court.

OPINION by GRAY, Commissioner. The issue on trial was whether the policy upon which the plaintiff sought to recover had been forfeited by reason of the failure of the assured to comply with its terms. The plaintiff proved the issuing of a pamphlet by the defendant, but did not offer it in evidence. The plaintiff's counsel in summing up, notwithstanding the objection by the defendant's counsel, that the pamphlet had not been offered in evidence, was permitted to read from it and state its contents to the jury, the judge holding that he might do so by way of summing up, to which the defendant excepted, and as a part of what the judge permitted to be done by way of argument, the counsel stated the contents of portions of the pamphlet, saying among other things, that it contained the words "non-forfeitable policies" upward of forty times. This was a manifest error on the part of the judge, and one of the character of errors which on the trial of causes often results in unjust verdicts. Permitting the pamphlet to be thus read and its contents stated was more in the nature of admitting its statements in evidence than a summing up upon the evidence legitimately before the court and jury. It is possible that the error did not result in harm to the defendants. When an error of this kind, persisted in by counsel, has the sanction of the presiding judge, it can hardly be supposed (considering the respect shown by jurors to the court) that what occurred did not prejudice the defendant, and may not, like any other error committed that way, have prejudiced the objecting party with the jury. It is for the party in whose favor the error is committed to show affirmatively that the verdict must have been as it was, notwithstanding the error.

We cannot say that the error was harmless, and must, therefore, reverse the judgments of the general term and circuit, and order a new trial.

All concur.

NOTES OF NEW BOOKS.

MESSRS. ROBERT CLARKE & Co. of Cincinnati have ready volumes 1 and 2 of their republication of the Ohio State Reports. It is proposed to issue two volumes every month until the series is complete. The Ohio State and Ohio Reports, embracing all the published decisions of the Supreme Court of the State to the present time, are to be furnished at the unprecedentedly low price of $107.50, or $2.50 a volume.

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MESSRS. SUMNER, WHITNEY & Co., of San Francisco, have recently issued a volume entitled *California Citations*, the name of which indicates its nature. It has been prepared by Robert Desty, Esq., and is printed in a most satisfactory manner, the type being well adapted to the character of the book. Like all works of its class it has a standard value, and merits the favorable consideration of the profession. Price $7.50.

ADAMS'S AND DURHAM'S Real Estate Statutes and Decisions will be published by Messrs. Callaghan & Co., of Chicago, during the present month.

THE FOURTH VOLUME OF *Bissell's Reports* is announced as in press by the same publishers. Mr. Bissell's series is one of exceptional value to the practitioner in the Federal courts. A large number of the opinions it contains are by Judge Drummond, whose views are of great weight in every section of the country.

MESSRS. COCKROFT & Co., of New York, are prepared to supply the first volume of a new edition of *Campbell's Lives of the Lord Chancellors*. The volumes are illustrated by Speigle and others, handsomely printed, and will be issued monthly at $3.50 a volume.

MESSRS. BAKER, VOORHIS & Co. have issued a pamphlet embracing all the U. S. statutes concerning bankruptcy, including the act of June 22, 1874. Price 75 cts.

A SECOND EDITION OF *Flanders on Insurance* will be published in the course of a few weeks by Messrs. Claxton, Remsen & Haffelfinger of Philadelphia.

THE FIRST NUMBER of the new series of the *Psychological and Medico-Legal Journal* has made its appearance. Dr. Hammond resumes the editorship, and the work is published by F. W. Christern, 77 University Place, New York. It is greatly to be hoped that the new series will meet with the success it merits. The first number is in every respect attractive. Subscription price $5.

THE AMERICAN LAW TIMES.

NEW SERIES. — SEPTEMBER, 1874. — VOL. I., NO. 9.

DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. ..... *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & Co.
Am. Law Rec. ..... *American Law Record*, Cincinnati, O., H. M. MOOS.
Am. Law Reg. ..... *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & Co.
Cent. L. J. ..... *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.
Chicago L. N. ..... *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS Co.
Daily Reg. ..... *Daily Register*, New York, 303 BROADWAY, N. Y.
Ins. L. J. ..... *Insurance Law Journal*, New York, C. C. HINE, 176 BROADWAY.
Int. Rev. Rec. ..... *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
Leg. Chron. ..... *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
Leg. Gazette ..... *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.
Leg. Int. ..... *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
Mo. West. Jur. ..... *Monthly Western Jurist*, Bloomington, Ill., THOMAS F. TIPTON.
Pac. Law Rep. ..... *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
Pittsb. L. J. ..... *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
West. Jur. ..... *Western Jurist*, Des Moines, Iowa, MILLS & Co.

ADMISSIONS OF COUNSEL.

See EVIDENCE, 5.

BANKRUPTCY.

1. SPECIAL DEPOSIT. — RATIFICATION. — PREFERENCE. — A, a banker, having in his custody certain government bonds on special deposit as the property of B, used a portion of them, substituting in lieu of such as he used a note and mortgage equal in amount thereto. Shortly after the substitution B was informed of the same and signified his acquiescence by directing his attorneys to foreclose the mortgage and otherwise.

A having been adjudged a bankrupt, a bill was filed by the assignees to set aside the "transfer," of the note and mortgage. *Held*, that B having ratified the substitution, the note and mortgage became his property as much as the bonds would have been had no substitution taken place; that there was no preference in the sense of the bankruptcy act, and that the assignees could not reach the note and mortgage. *Cook* v. *Tullis*, Leg. Gazette, July 10, 1874.

2. THE ESTATE TAKEN BY AN ASSIGNEE OR TRUSTEE is the estate of the bankrupt — no more and no less. And it is subject to all legal and equitable claims in their hands, and all the equities hold good against them which might have been urged against the bankrupt had there been no assignment. *Ib.*

COMMON CARRIER.

NOT LIABLE BEYOND ITS OWN ROUTE. — A common carrier is not liable for the loss of goods, where such loss occurs beyond the terminus of its own route, even if the goods are received and marked for a point upon another route. *Berg* v. *Narragansett Steamship Co.*, N. Y. Court of Common Pleas, Daily Reg., July 23, 1874.

CONSTITUTIONAL LAW.

1. GENERAL AND SPECIAL LAWS. — CORPORATION. — A state constitution provided that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

The legislature passed an act conferring certain privileges upon a corporation, which concluded as follows: "This act shall not take effect unless the parties named in section one shall, within sixty days after its passage, duly organize themselves in conformity with the existing laws regulating corporations now in force in this State." *Held*, that the act was an infraction of the provision quoted. *San Francisco* v. *Spring Valley Water Co.*, Pac. Law Rep., July 7, 1874.

2. THE ILLINOIS "GRAB LAW." — ACT OF APRIL 16, 1869, UNCONSTITUTIONAL. — *Held*, that the act of April 16, 1869, of Illinois, entitled "An act to fund and provide for paying the railway debts of counties, townships, cities, and towns" is unconstitutional, because it provides for the imposition of a higher rate of taxation for state purposes on taxable property, in counties which have no outstanding indebtedness incurred in aid of the construction of railways, than is imposed on taxable property in counties which have such indebtedness. *Ramsey* v. *Hoeger*, Cent. L. J., July 2, 1874; Mo. West. Jur., July, 1874.

See PATENT; USURY.

CONTRACTS.

RESTRAINT OF TRADE. — A steamship company engaged in the business of transportation on the rivers, bays, and waters of California sold one of their steamers to another company which was engaged in a similar business on the Columbia and its tributaries in Oregon, provided the latter company would agree that the steamer should not be used in the

California waters for ten years from the year 1864. Three years afterwards the Oregon company sold the same steamer to the defendants, who were engaged in the business of transportation upon Puget Sound in Washington Territory, provided that the latter would agree that the steamer should neither be employed upon the rivers, bays, and waters of California nor on the Columbia River or its tributaries for ten years from the year 1867. *Held*, that under the accepted rule, that contracts in restraint of trade are divisible, the agreement last named could be divided without confusion or uncertainty, and the extra period of three years in reference to the California waters separated from that which was necessary to the protection of the Oregon company. That the contract first mentioned was unobjectionable. Supreme Court U. S. Opinion by BRADLEY J., CLIFFORD, SWAYNE, and DAVIS, JJ., dissenting. *Oregon Steam Nav. Co.* v. *Winsor*, Cent. L. J., July 16, 1874; Albany L. J., July 18, 1874.

See PLEADING AND PRACTICE, 5.

CORPORATION.

See CONSTITUTIONAL LAW, 1; MUNICIPAL CORPORATION.

CRIMINAL LAW.

CONFESSION. — It is not error to submit an alleged confession to the jury on the evidence to say whether any improper influence was used, nor in charging that, if there was improper influence, the confession should be disregarded.

Disclosures drawn from a prisoner may be deductions of specific facts rather than confessions; and while such admissions are to be strictly guarded against improper influence, they are a lower order of evidence than actual confessions of guilt. A prisoner may admit a damaging fact without any intention of confessing his guilt. *Brown* v. *Commonwealth*, Leg. Chron., July 18, 1874.

See EVIDENCE, 3.

CUSTOM.

See PLEADING AND PRACTICE, 5.

DAMAGES.

FOR INJURY BY NEGLIGENCE OF RAILROAD. — The court below charged the jury as follows: "If the plaintiff, at the time of the injury, was engaged in a legitimate business, from which pecuniary profits had arisen and future profits might be reasonably expected, which business was interrupted or suspended in consequence of disabilities, physical or mental, inflicted by the negligence of the defendant, the loss of such anticipated profits is properly the subject of compensation in damages." *Held*, that there was no error. The damages in cases like the present are to be arrived at by considering the reduction which has been wrought upon plaintiff's earning powers whether mental or physical, or both combined, and in order to do this properly reference must be had to the business in which he was engaged at the time of the accident. The

amount is a matter for the jury to determine from all the facts presented for their consideration. *Penna. R. R. Co.* v. *Dale*, Leg. Gazette, July 3, 1874; Leg. Chron. July 11, 1874.

EMINENT DOMAIN.

POWER OF MUNICIPAL CORPORATION IN RESPECT OF. — The legislature is the sole judge of the necessity or expediency of exercising the right of eminent domain, and where it delegates the right to exercise the power, it delegates, also, the discretion as to when and under what circumstances such right shall be made use of. Hence, where the right to take private property for public purposes has been delegated to a municipal corporation, the corporation may determine as to the expediency of the taking, and if there be no other question, the courts are without any authority in the premises. There is, under such circumstances, no judicial question involved. *Chicago, R. I. & P. R. R. Co.* v. *Town of Lake*, Chicago L. N., July 4, 1874.

ENFORCEMENT ACT.

AS TO REMOVAL OF CAUSES. — The provisions of the act of April 20, 1871, known as the "Enforcement Act," do not warrant the removal of cases from a state to a United States court. Said act relates only to cases originally commenced in a federal court. *People* v. *C. & A. R. R. Co.*, Cent. L. J., July, 9, 1874.

EQUITY JURISDICTION.

See JURISDICTION; PLEADING AND PRACTICE, 5; TRADE NAME.

EVIDENCE.

1. PHOTOGRAPH AS EVIDENCE TO IDENTIFY PARTY. — A photograph may be introduced in evidence to identify a person. The process of producing photographs has come to be so generally understood and recognized as a means of taking correct likenesses that a court will not refuse to take judicial cognizance thereof. *Udderzook* v. *The Commonwealth*, Leg. Int., July 10, 1874.

2. THE HABITS OF A PERSON may be shown for purposes of identification. Thus the habit of intoxication may be proved and is entitled to such weight as the jury may give it. *Ib.*

3. WHERE TWO PERSONS ARE MURDERED at the same time and place, and under circumstances evidencing that both acts were committed by the same person or persons, and were part of one and the same transaction or *res gestæ*, and tends to throw light on the motive and manner of the murder for which the prisoner is indicted, the death of the one and surrounding circumstances may be given in evidence upon the trial of a prisoner for the murder of the other, not as an independent crime, but as tending to show that the motive was one and the same that led to the two crimes at the same time. As part of the same *res gestæ* they explain each other. *Brown* v. *Commonwealth*, Leg. Chron., July 18, 1874.

4. TERMS OF ACCEPTANCE OF OFFER TO SELL — Evidence to show the terms of acceptance of an offer to sell real estate is competent. *Clendenon* v. *Pancoast*, Leg. Gazette, July 3, 1874; Leg. Chron., July 11, 1874.

5. ADMISSION OF COUNSEL AT FORMER TRIAL. — On the trial of a case it became necessary to prove the incorporation of the defendants, their existence, and that certain persons were officers of the corporation at a time specified in the declaration. To prove these facts the plaintiff offered evidence that, at a former trial, the defendants' counsel admitted them to be true. To the admission of this testimony the defendants objected, and offered proof that said facts were admitted for the purposes of the former trial, and that the plaintiff previously to the present trial had notice that the same would not again be admitted, but would be denied. *Held*, that the evidence was competent. Admissions by a party either in or out of court may be proved, but it does not follow that such party is estopped from denying them. *Perry* v. *Waterproof Man. Co.*, Am. Law Reg., July, 1874.

See CRIMINAL LAW.

JUDGMENT NOTE.

See LIMITATIONS.

JURISDICTION.

OF U. S. COURTS TO COMPEL PAYMENT OF MUNICIPAL BONDS. — EQUITY JURISDICTION. — MANDAMUS. — A suit in equity was brought in a United States court by certain holders of bonds issued by what is called the Board of Levee Commissioners of the levee district for the parishes of C. and M. of the State of Louisiana. The board thus described was made a *quasi* corporation by the legislature of the State, with authority to issue the bonds and provide for the payment of interest and principal by taxes levied on the real and personal property within the district. The bill alleged a failure to levy these taxes and to pay the interest on any part of said bonds; that the persons duly appointed levy commissioners had resigned or pretended to do so for the purpose of evading this duty, and that they had applied to the judge of the district court, who was by statute authorized to levy a tax on the alluvial lands to pay the bonds if the levee commissioners failed to do so.

The prayer for relief was that the levee commissioners be required to assess and collect the tax necessary to pay the bonds and interest, and, if after reasonable time they should fail to do so, that the district judge be compelled to do the same, and for such other relief as the case required.

No judgment at law had been recovered on the bonds or any of them, nor had any attempt been made to collect the money due by proceedings in a common law court.

Upon the above facts the bill was dismissed by the circuit court. Upon appeal to the supreme court, *held*, that it has been decided in numerous cases, founded on the failure to pay corporation or municipal bonds, that the appropriate proceeding is to sue at law, and by a judgment of the court establish the validity of the claim and the amount due, and by the return of an ordinary execution ascertain that no property of the corporation can be found liable to such execution and sufficient to satisfy the judgment. Then, if the corporation has authority to levy and collect taxes for the payment of the debt, a mandamus will issue to com-

pel the levy of a tax to raise the amount necessary to pay the judgment. But unless there is some difficulty or obstruction in the way of this common law remedy, chancery can have no jurisdiction.

As to the point that by reason of the resignation of the levee commissioners no suit can be sustained against them so as to procure a judgment upon which to base a mandamus, it is sufficient that a court of chancery possesses no powers to compel persons to submit to its jurisdiction, not possessed by a common law court when the latter is competent to give relief.

The case of *Rees* v. *Watertown*, 1 Am. L. T. R. N. S., is decisive of the points at issue, and the bill was properly dismissed. *Heine* v. *Board of Levee Commissioners, &c.* Albany L. J., June 27, 1874.

LIMITATIONS.

1. JUDGMENT NOTE. — An action upon a judgment note is not barred by the statute of limitations applicable to an ordinary promissory note. The period prescribed in such a statute having intervened between the maturity of such a note and the entry of judgment upon it, it was *held* that the remedy was not barred. *Morris* v. *Hannick*, Leg. Int., July 17, 1874.

2. MEXICAN GRANT. — The statute of limitations of California does not begin to run against a confirmed Mexican grant, finally located under the act of Congress of 1860, until the patent issues. *Leroy* v. *Carroll*, Pac. Law Rep., June 23, 1874.

MANDAMUS.

See JURISDICTION.

MEMBERSHIP.

MEMBERSHIP OF BOARD OF BROKERS. — APPLICATION OF PROCEEDS OF SALE OF. — Under the articles of association of a board of brokers it was provided that the seat of a member who failed to settle with his creditors within a year from the time of his suspension, should be sold by the secretary, and the proceeds paid *pro rata* to his creditors in the board. *Held*, that the effect of the provision was to place the seat in the hands of the secretary as a pledge for the objects stated. *Leech* v. *Leech*, Leg. Int., July 3, 1874.

MORTGAGE.

See SALE.

MUNICIPAL BONDS.

See JURISDICTION; USURY.

MUNICIPAL CORPORATION.

See EMINENT DOMAIN.

NEGLIGENCE.

INJURY BY REASON OF DEFECTIVE HIGHWAY, WHERE PARTY HAD

BY PREVIOUS ACCIDENT LOST CONTROL OF HIS HORSE. — A, plaintiff's servant, was driving plaintiff's horse on a town road in plaintiff's buggy, and while so driving, by reason of an accident, which appeared to be unavoidable, the horse became detached from the buggy, and running away, furiously ran upon defendant's turnpike and upon a bridge, which had no railing, and over the side thereof, whereby he was injured. Prior to the horse becoming detached from the buggy A was thrown out, but for which, he testified, the horse would have been checked. It appeared, too, that the horse ran for some distance beyond the limits of any highway, and that the bridge was only thirty feet from the end of the town road upon which the breaking of the buggy took place. *Held*, that it having been found that A was not in fault, plaintiff was entitled to recover. *Baldwin* v. *Turnpike Co.*, Am. Law Reg., July, 1874.

See DAMAGES; PLEADING AND PRACTICE, 2.

PATENT.

INVALIDITY OF STATE ENACTMENTS AFFECTING THE SALE OF PATENT RIGHTS. — An Illinois statute, passed to prevent fraud in the sale of patent rights, contained provisions as follows: The first section made it unlawful for any person to sell or offer to sell in any county in the State any patent right without first making the affidavit and proof required by the second section of the act.

The second section provided that any person desiring or intending to sell any patent right, before offering to sell the same, should submit to the clerk of the county court of the county in which he desired to pursue such business, for his examination, the letters patent and a certified copy thereof, and his authority to sell the right so patented, and at the same time make a prescribed affidavit; and if such clerk be satisfied that the right so intended to be sold had not been revoked or annulled, and that the applicant was at the time duly empowered to sell the same within such county, &c., the clerk should record the affidavit and letters patent, and give a certificate thereof.

The third section required any person to whom such certificate was issued, to exhibit the same on demand.

The fourth section provided that there should be written or printed in every promise, or obligation in writing, the consideration of which, in whole or in part, should be a patent right, the words, "Given for a patent right, and all such obligation or promises, if transferred, shall be subject to all defences, as if owned by the original promisee."

The fifth section imposed penalties for a failure to comply with the preceding sections.

The sixth section required the payment of three dollars to the county clerk for his services in taking proof. *Held*, that all of the sections recited were in conflict with the Constitution of the United States, and, therefore, void. *Hallida* v. *Hunt*, Chicago L. N., July 18, 1874.

PLEADING AND PRACTICE.

1. RULE AS TO PLEA JUSTIFYING TRESPASS UPON AUTHORITY OF ANOTHER. — It is an old rule of pleading, which, in the modern progress

of simplifying pleadings, has not lost its virtue, that whenever one justifies in a special plea an act which in itself constitutes at common law a wrong, upon the process, order, or authority of another, he must set forth substantially and in a traversable form the process, order, or authority relied upon, and that no mere averment of its legal effect, without other statement, will answer. In other words, if a defendant has cause of justification for an alleged trespass, and undertakes to plead it, he must set it forth in its essential particulars, so that the plaintiff may be apprised of its nature and take issue upon it if he desires, and so that the court may be able to judge of its sufficiency. *Bean* v. *Beckwith*, Leg. Gazette, July 3, 1874.

2. ASSUMPSIT AGAINST A BAILEE cannot be maintained for a mere loss or detention by negligence.

It should appear that there has been an actual conversion of the goods into money, at least that the circumstances are such as to raise a presumption to that effect, or that there has been fraud or unfair dealing or some other fact from which an implication of a promise may arise. *Satterlee* v. *Melick*, Leg. Gazette, July 10, 1874.

3. IN SUPREME COURT U. S. IN RESPECT OF EXCEPTIONS WHERE CASE IS TRIED BY COURT BELOW WITHOUT A JURY. — The supreme court of the United States will regard the findings of fact of a judge, where a jury has been waived, just as it would the findings of a jury.

Under the act of Congress which permits such a trial, the findings are in the nature of a special verdict, and requests or prayers for instructions made to control the final conclusion of the court as to the plaintiff's right to recover are not the proper subjects of exceptions. *Mercantile Mut. Ins. Co.* v. *Folsom*, Ins. L. J., July, 1874.

4. NONSUIT. — A U. S. CIRCUIT COURT has not the power to order a peremptory nonsuit against the will of the plaintiff. The defendant, however, may move the court to instruct the jury that the evidence is insufficient, and if the court refuse to so instruct, the refusal is a proper subject of exception. *Ib.*

5. CONTRACT. — CUSTOM. — EQUITY JURISDICTION. — A contract was made by the defendant to ship by the plaintiff certain boxes of bacon, some at $\frac{3}{4}$ of a cent per pound, and some at current rates of the day. Nothing was said between the parties when the contract was made, or before or after as to whether the rate was to be computed in gold or paper currency, or whether any sum for primage or average was to be added to the rate expressed. It was admitted that a custom existed, well known to defendant, where the contract was made and at the time it was made and long prior thereto, that the rate of freight was to be computed in gold, and that five per cent. was to be added to the freight for primage and average. Plaintiff proceeded in equity for a reformation of the contract. *Held*, that a court of equity was without jurisdiction, the custom being provable in an action on the contract. *Mackenzie* v. *Schmidt*, Am. Law Reg., July 18, 1874.

See REMOVAL OF CAUSES.

PROMISSORY NOTE.

ASSIGNMENT OF. — EFFECT OF STRIKING OUT. — When a party holds a promissory note by assignment, he and the assignor may by agreement strike out the assignment, and by so doing the legal title to the note, without reference to the equitable interest, will thus be restored or returned to the assignor. By erasing the indorsement the legal title reinvests in the assignor as effectually as if it had been reindorsed to him.

Whilst the mere delivery of a note on its sale to the purchaser passes the equitable title to the instrument, still the legal title remains in the payee if not indorsed, and, if so, then in the last indorsee. The equitable title passes by delivery, but the legal title only by assignment, or its equivalent.

And the striking out of an assignment is the equivalent of an indorsement to the next previous indorsee. *Dempster* v. *West*, Chicago L. N., July 11, 1874.

PUBLIC SCHOOL.

COLORED CHILDREN. — The directors of a school district in Illinois, in order to prevent four colored children from attending the school in the district provided in pursuance of law, erected a small school-house, on the same lot where the other school-house stood, and, at the expense of the tax payers of the district, proposed to employ a teacher for the sole purpose of instructing the four colored children apart from the others in the separate building provided for that purpose. A bill was filed by certain of the tax payers to prevent the directors from misappropriating the public funds by carrying out their purpose as above recited. *Held*, that the relief prayed for should be granted. That the free schools of the State of Illinois are public institutions, and in their management and control the law contemplates that they should be so managed that all children within the district, between the ages of six and twenty-one years, regardless of race or color, shall have equal and the same right to participate in the benefits to be derived therefrom.

While the directors very properly have large and discretionary powers in regard to the management and control of schools, in order to increase their usefulness, they have no power to make class distinctions, neither can they discriminate between scholars on account of their color, race, or social position. *Chase* v. *Stephenson*, Mo. West. Jur., July, 1874.

RATIFICATION.

See BANKRUPTCY, 1.

REMOVAL OF CAUSES.

1. NOMINAL PARTY. — CITIZENSHIP. — ACT OF '67. — An action was brought for covenant broken, predicated on the covenants in a lease executed on the 16th of January, 1857, by A and B, citizens of New York, and trustees of the first mortgage on the Western Vermont railroad, to the defendants, also citizens of New York. The defendants asked the state court, in which the action was brought, in a petition addressed to it, to remove the cause on the alleged ground that A and B were mere nom-

inal parties to it, having no interest in the subject matter of the controversy, which was wholly between the Bennington & Rutland Railroad Company, a Vermont corporation, and themselves. This petition, with the proper affidavit of local prejudice annexed to it, together with the original writ, declaration, and pleas were transmitted to the circuit court of the United States for the district of Vermont. The plaintiffs, upon these papers, the certified copy of the lease, and the affidavits of certain persons that there were outstanding bonds of the Western Vermont Railroad which had not been converted into or exchanged for the stock of the Bennington & Rutland Railroad Company, nor in any other way paid or discharged, moved the court to remand the cause to the state court for want of jurisdiction.

The motion was denied, the court resting its decision on the ground that A, the surviving plaintiff, B having died, was only a nominal party to the suit. The case having been taken to the supreme court of the United States on writ of error, it was *held* that the circuit court was without jurisdiction, both the parties to the action being citizens of the same state. The act of 1867, on the subject of the removal of causes from the state to the federal courts, which extends the provisions of the act of 1789, so as to allow either the plaintiff or defendant to remove the cause for the reason stated, at any time before final judgment, does not change the settled rule that determines who are to be regarded as the plaintiff and the defendant. *Knapp* v. *Troy & Boston R. R. Co.*, Chicago L. N., July 11, 1874; Int. Rev. Rec., July 20, 1874.

2. CONSTRUCTION OF ACT OF 1867 AS TO TIME WHEN REMOVAL MAY BE MADE. — A cause may be removed under the act of 1867 at any time before final trial. A trial before a jury in which the jury fail to agree is not to be regarded as a final trial. *Clarke* v. *Del. & Hudson River R. W. Co.*, Am. Law Reg., July, 1874.

See ENFORCEMENT ACT.

RESTRAINT OF TRADE.

See CONTRACT.

RETROACTIVE STATUTE.

See USURY.

SALE.

WHEN ASSIGNEE OF MORTGAGEE MAY SELL MORTGAGED PREMISES. — A executed a note and mortgage to B, who afterward sold the note to C. Default having been made in the payment of the note, the mortgaged premises were sold by B, whose name had been erased from the back of the note by agreement with C in order that B might make the sale and C become the purchaser. At the sale C became the purchaser and B made him a deed. *Held*, that B could sell and C purchase. *Dempster* v. *West*, Chicago L. N., July 11, 1874.

SPECIAL DEPOSIT.

See BANKRUPTCY.

SPECIAL LAW.

See CONSTITUTIONAL LAW.

SURVEY.

PLAT AND MONUMENT. — *Held*, that if there be a discrepancy between the location of a line as shown by a plat and monument, the latter should prevail. *Lull* v. *City of Chicago*, Chicago L. N., July 4, 1874.

TRADE-MARK.

GEOGRAPHICAL NAME. —The name of a town or borough cannot be used as a trade-mark by one of its residents to the exclusion of other residents of such town or borough, even if the name was adopted prior to the act of incorporation. The adoption of the name as a geographical designation gives to it a public character which makes it the common property of the public for all legitimate purposes. The authorities do not conflict with this doctrine, but on the contrary support it. *Glendon Iron Co.* v. *Uhler*, Leg. Gazette, July 3, 1874; Leg. Chron., July 11, 1874.

TRADE NAME.

EQUITY WILL NOT PROTECT PRIVATE PARTIES IN THE USE OF A FIRM NAME IMPLYING THAT THERE IS A CORPORATION. — A and B, the plaintiffs, were engaged in business, without an act of incorporation of any kind, under the name and style of the "Galaxy Publishing Company." Defendants adopted the same name. *Held*, that plaintiffs having been guilty of a fraud upon the public in adopting a name that was calculated to mislead, could have no standing in a court of equity. *McNair* v. *Cleave*, Leg. Int., July 3, 1874.

TRESPASS.

See PLEADING AND PRACTICE, 1,

USURY.

MUNICIPAL BONDS. — RETROACTIVE STATUTE. — CONSTITUTIONAL LAW. — In the year 1863 the town of Danville, Virginia, executed certain certificates of indebtedness, a part of which passed into plaintiffs' hands. In 1873 a law was enacted by the State of Virginia, one section of which was as follows: "No corporation shall hereafter interpose the defence of usury in any action, nor shall any bond, note, debt, or contract of such corporation be set aside, impaired, or adjudged invalid by reason of anything contained in the laws prohibiting usury." *Held*, that said section was retroactive in its character, and embraced all contracts of corporations whether entered into before or after its adoption.

That although retroactive it was not an infraction of the Constitution of the United States, it being well settled, that although a statute may take away vested rights, it is not, for that reason merely, to be treated as repugnant to any provision of the federal organic law. Nor was it invalid as impairing the obligation of a contract; nor in contravention of the constitution of the State of Virginia.

That usury laws are founded upon considerations of public policy, and are to be regarded as purely remedial and subject to the modification and control of the legislative department, even as applied to transactions which took place prior to their being in force.

Therefore in an action by the plaintiff against the town of Danville, the town could not plead usury. *Danville* v. *Pace*, Albany L. J., July 25, 1874.

WILL.

1. INTENTION. — MISTAKE AS TO VALUE BY TESTATOR. — Where it appeared that the testator was mistaken as to the value of his estate, and his intention was clearly to provide for a daughter, the allowance to such daughter was increased. *Snyder's App.*, Leg. Gazette, May 15, 1874.

2. CONSTRUCTION. — LIFE ESTATE. — A will contained the following:

"Item, I give and bequeath to my beloved wife Jane one third of all my personal property, and one third part of all the income, rents, and use of my real estate."

"Item, I do give and bequeath unto my son William all the residue and remainder of my estate, real or personal." *Held*, that the wife took a life estate. *France's App.*, Leg. Gazette, May 29, 1874; Leg. Int., May 29, 1874.

3. CONSTRUCTION LIFE ESTATE. — A will contained the following: "I give and bequeath to my beloved wife, Nancy Sinclair, all my estate both real and personal; that is to say, all my lands, cattle, horses, farming utensils, household and kitchen furniture, with everything that I possess; *to have and to hold during her life, and to do with as she sees proper before her death.*" *Held*, that the devisee had power to dispose of the real estate of testator. *Brant* v. *Va. Coal & Iron Co.*, Chicago L. N., May 30, 1874.

4. UNHARVESTED CROPS go to the devisee of the land and not to the executor.

As against the heirs at law they go to the executor, but as against the devisee they do not. *Dennett* v. *Hopkinson*, Am. Law Reg., June, 1874.

HARVESTED CROPS in a barn pass by virtue of a bequest of "all the household furniture and other articles of personal property in and about the buildings." *Ib.*

5. FUND FROM POLICY OF INSURANCE. — INFERENCES CONCERNING an intention on the part of a testator, by his will, to dispose of the fund arising from an insurance policy upon his life, will not be inferred from the fact that his bequests were ultimately found to exceed the whole amount of his estate exclusive of this fund; nor from the fact that he designated a person as the legatee of the residue of his property of every description whatsoever. The testator's intention to change the description which the law gives to this very peculiar species of property is not to be inferred from general provisions in his will, the fulfilment of which might require the use of such money, but must be explicitly declared. *Hathaway* v. *Sherman*, Ins. L. J., June, 1874.

DISTRICT COURT U. S.—EASTERN DISTRICT OF MICHIGAN.

[JULY, 1874.]

BANKRUPTCY. — ADJUDICATED CASES NOT AFFECTED BY ACT OF JUNE 22, 1874.

IN RE ANGELL.

The retroactive provision of section 12 *of the Bankruptcy Act of June* 22, 1874, *does not apply to cases in which adjudications had passed before the approval of the act.*

ON the motion of the bankrupt to dismiss the proceedings unless the petitioning creditor shall procure other creditors to join with him in the petition for adjudication, so that the petitioning creditors shall constitute at least one fourth in number of all the creditors, and whose aggregate debts shall amount to at least one third of the debts provable, &c., as required by the act of Congress approved June 22d, 1874, entitled "An Act to amend and supplement an act entitled An Act to establish a uniform system of bankruptcy," &c.

The case is one of compulsory or involuntary bankruptcy. The petition for adjudication was filed on the 28th day of May, 1874, by a single creditor; and, having been filed before the recent act, it of course contains no allegation as to number and amount of creditors and debts; and it is conceded that the number and amount is less than one fourth and one third, as required in those respects by said act. The debtor failed to appear, and on the 8th day of June, 1874, the return day of the order to show cause, he was duly adjudicated a bankrupt; and the usual warrant was at once issued and was executed. All of which proceedings took place, as will be observed, after the 1st day of December, 1873, and before the recent act.

No objection whatever is taken, nor does any exist, to the sufficiency of the petition, to the jurisdiction of the court, or to the regularity of the proceedings, as the law then was; and it is fully conceded that but for the said act of June 22, 1874, the proceedings and adjudication are unimpeachable.

The provisions of the act upon which this motion is founded are contained in section thirty-nine of the original act, as amended and reënacted, being section twelve of the amendatory act, and they are as follows (the portions here involved being in italics):—

"Section 39. That any person residing and owing debts as aforesaid, who, after the passage of this act, shall" (commit certain specific acts), "shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, *who shall constitute one fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one third of the debts so provable:* Provided, that such petition is brought within six months after such act of bankruptcy shall have been committed. *And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy,*

commenced since the first day of December, 1873, *and prior to the passage of this act, as well as to those commenced hereafter*," &c.

Longyear, J. That the provisions of the recent act requiring one fourth in number, and one third in amount, of the creditors, to join in an involuntary petition for adjudication of bankruptcy were intended to apply, and can and must be applied to all cases commenced between December 1, 1873, and the passage of that act, *in which there has been no adjudication*, I entertain no doubt; and it has been so held by the district court for the Northern District of Illinois; *In re Scammon*, 1 Am. L. T. R., N. S; but the question here goes beyond that. It is whether those provisions were intended to apply, and can be applied, to cases so commenced, *which had passed into judgment before* the passage of the act.

The act cannot be given the application and effect contended for, because it involves the vacating and annulling the judgment of the court, and granting a new trial. No rule of constitutional law is better settled than that in a constitutional government, with a division of powers like that of the United States, no legislative enactment can have the effect and operation to annul the judgment of a court already rendered, or grant a new trial, especially as it respects adjudications upon the private rights of parties. "When they have passed into judgment," says Justice Nelson, in *State* v. *Wheeling Bridge Company*, cited below, "the right becomes absolute, and it is the duty of the court to enforce it." Cooley's Const. Lim. 93 and 95 and cases cited; *The State* v. *Wheeling, &c. Bridge Co.* 18 How. 421, 431, and see also the dissenting opinions of Justices McLean, Grier, and Wayne, at pages 437, 449; *Mason* v. *White*, decided by the supreme court of Michigan at the January term of 1874, not yet reported.

Courts will not presume that Congress intended to exceed its powers, or in any manner to invade the domain of the judiciary, unless such intent is clearly expressed by the words used, or by necessary implication. The words used in a statute may be broad enough, and they probably are in the statute under consideration, to admit of such a construction; but the courts will in no case give them a construction that involves the exercise of an excess of power, where, by a more limited application of them, such exercise of power is not involved.

In the present instance the enactment in question is given full effect, and in my opinion all the effect Congress intended it should have, by applying and limiting it to cases still pending, and undisposed of by adjudication. It is abundantly evident that Congress did not intend these provisions to apply to cases already adjudicated, for the following reasons: —

1. It was not in their power to do so, as already shown.
2. They did not so expressly enact.
3. The provisions can have full and consistent effect without giving them such application.
4. They made no provision for the saving of rights accrued or acts done under adjudications in cases where the proceedings might, under the provisions in question, eventually fail and be dismissed. And this has still greater force from the further fact that they did make such saving provision in case of a discontinuance of proceedings as provided by section

14. Other reasons will readily suggest themselves, but the foregoing I consider conclusive.

I hold, therefore, that the provisions in question apply only to cases where the petition for adjudication is still pending, and not to cases in which adjudications had passed upon the petition before the approval of the act.

It results that the motion must be denied. Ordered accordingly.

THE NEW ACT AFFECTING COPYRIGHTS, ETC.

AN ACT to amend the Law relating to Patents, Trade-marks, and Copyrights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz.: "Entered according to act of Congress, in the year ——, by A. B., in the office of the Librarian of Congress, at Washington;" or, at his option, the word "Copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out; thus: "Copyright, 18—, by A. B."

SEC. 2. That for recording and certifying any instrument of writing for the assignment of a copyright, the Librarian of Congress shall receive from the persons to whom the service is rendered one dollar; and for every copy of an assignment, one dollar; said fee to cover, in either case, a certificate of the record, under seal of the Librarian of Congress; and all fees so received shall be paid into the Treasury of the United States.

SEC. 3. That in the construction of this act, the words "Engraving," "cut," and "print" shall be applied only to pictorial illustrations or works connected with the fine arts; and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints, except that there shall be paid for recording the title of any print or label not a trade-mark, six dollars, which shall cover the expense of furnishing a copy of the record, under the seal of the Commissioner of Patents, to the party entering the same.

SEC. 4. That all laws and parts of laws inconsistent with the foregoing provisions be and the same are hereby repealed.

SEC. 5. That this act shall take effect on and after the first day of August, eighteen hundred and seventy-four.

Approved, June 18, 1874.

[NOTE. The above act has been construed by the newspapers to be a measure of real importance and one conferring privileges which did not exist prior to its passage. An examination of its provisions will, however, disclose that it has practically no force whatever, other than to decrease the labors of the Librarian of Congress at the expense of the Commissioner of Patents.

Manufacturers are permitted to file their labels, &c., in the Patent Office upon paying a duty of six dollars, but they do not thereby acquire a right of action, nor is the label clothed with new attributes of any kind. Numerous parties may deposit the same design, and, whatever the facts as to ownership, each design will be duly "registered" without let or hindrance or even examination, except to determine whether or not it pertains to the fine arts and whether or not it is a trade-mark. In short, substantially the only privilege conferred is that of paying six dollars.

To pronounce the act an anomaly is to cloak its almost ridiculous character. It is neither more nor less than an imposition upon the public. It provides for the payment of a duty without the semblance of a return. It appeals effectively to a class long accustomed to a misconstruction of the copyright laws, and its only success will consist in fleecing them, along with others, of six dollars for every label, instead of fifty cents as hitherto.

A more arrant blunder is not to be found in the history of American legislation. — EDITOR LAW TIMES.

NOTES OF NEW BOOKS.

MESSRS. A. L. BANCROFT & Co. of San Francisco will publish during the present month a second edition of *Freeman on Judgments*, a work of great merit. Price $7.50.

FORTESCUE'S DE LAUDIBUS LEGUM ANGLIAE is announced as in press by Messrs. Robert Clarke & Co. The edition will contain a life of the author by Lord Clermont, one of his descendants, and will be attractively published.

MESSRS. LITTLE, BROWN & Co. propose to reprint the entire series of the *Reports of Crown Cases Reserved*, to be embraced in six volumes, and edited with notes and references by F. F. Heard, Esq.

THE SAME HOUSE have in preparation *Cox's Criminal Law Cases*, containing cases in criminal law determined in all the English and Irish courts from 1843 to the present time.

PHILLIPS'S MECHANICS' LIENS, and a new edition of *Story on Agency*, the eighth, published also by Messrs. L., B. & Co., are now ready. Price of either, $7.50.

THE STATUTES of the United States relating to Bankruptcy, with notes by Seymour D. Thompson, Esq., of the *Central Law Journal*, is offered by Messrs. Soule, Thomas & Wentworth of St. Louis. Price 75 cts.

MESSRS. BAKER, VOORHIS & Co. announce a number of acceptable works, among which are *A Digest of the Law of Railways; Decolyar on the Law of Guarantees*, with notes and references to American cases; *Heard's Criminal Pleadings; Tyler's Mitford's Chancery Pleadings*, seventh American edition; *Leading Cases on the Law of Damages; Digest of the Law of Evidence at Nisi Prius*, arranged for American Practice on the plan of Roscoe's popular English work, and *Leading English Patent Cases*, with references to American decisions.

MESSRS. WM. GOULD & SON, of Albany, have now ready the sixth volume of *Moak's English Reports*. Price $6.

THE THIRD VOLUME of *American Railway Reports*, Jas. Cockcroft & Co., of New York, publishers, has been issued. Price $6.

THE AMERICAN LAW TIMES.

NEW SERIES. — OCTOBER, 1874. — VOL. I., NO. 10.

DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. ..... *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & Co.
Am. Law Rec. ..... *American Law Record*, Cincinnati, O., H. M. MOOS.
Am. Law Reg. ..... *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & Co.
Cent. L. J. ..... *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.
Chicago L. N. ..... *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS Co.
Daily Reg. ..... *Daily Register*, New York, 303 BROADWAY, N. Y.
Ins. L. J. ..... *Insurance Law Journal*, New York, C. C. HINE, 176 BROADWAY.
Int. Rev. Rec. ..... *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
Leg. Chron. ..... *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
Leg. Gazette ..... *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.
Leg. Int. ..... *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
Mo. West. Jur. ..... *Monthly Western Jurist*, Bloomington, Ill., THOMAS F. TIPTON.
Pac. Law Rep. ..... *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
Pittsb. L. J. ..... *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
West. Jur. ..... *Western Jurist*, Des Moines, Iowa, MILLS & Co.

ADMIRALTY.

MARITIME LIEN FOR REPAIRS AND SUPPLIES IN HOME AND FOREIGN PORTS. — *Held:* 1. That while in foreign ports the presumption of a necessity for relying upon the credit of the vessel for repairs arises from the necessity of repairs to enable the vessel to prosecute the voyage; in home ports the presumption of a necessity for relying upon the credit of the vessel does not exist.

2. That in a foreign port the master, as performing the duties of that officer, has authority to bind the vessel and her owners for the necessary expenses of the boat, but in the home port he has not that right.

3. That while in a foreign port the necessary repairs are restricted to such as will enable the vessel to pursue her voyage with safety, the repairs in the home port where they may be ordered by the owners, are not of necessity restricted within such narrow limits.

4. Those who in a home port furnish repairs and supplies must show affirmatively, in order to have a lien on the vessel, that is was necessary to rely on the credit of the vessel, or in other words, that the credit of the owners was not such as would justify a prudent man in furnishing the repairs and supplies solely on their personal credit. Many persons in the home ports have been accustomed, in consequence of the state boat acts, to suppose that repairs and supplies furnished there at the instance of the master gave a lien irrespective of all other considerations; but as they — so far as they trespass upon admiralty jurisdiction — are void, it is important that material-men in home ports bear in mind the distinction above stated, and the elements out of which a lien in a home port springs. *Taylor* v. *The Commonwealth*, Am. Law Reg., August, 1874.

BANKRUPTCY.

1. PRACTICE. — WITHDRAWAL OF CREDITORS. — Creditors who, since the amendment of June 2d, 1874, have joined in the petition, cannot afterwards be allowed to withdraw from the proceedings. Such a practice would lead to underhanded agreements between the debtor and a part of his creditors at the expense of the others, and cannot be allowed.

Semble: If *all* desire to dismiss the proceedings it could be done. *In re Heffron*, Chicago L. N., August 1, 1874.

2. CONSTRUCTION OF SEC. 39 AS AMENDED BY ACT OF '74. — Under the amendment to the 39th section of the bankrupt law, the debtor will be required to file a list of his creditors, and the amount of their claims, where an involuntary petition was filed against him since December 1, 1873, to which he had made a denial and a demand for a jury trial, and had since filed a demurrer. *Warren Savings Bank* v. *Palmer*, Chicago L. N., August 8, 1874; Leg. Int., August 14, 1874.

3. ACT OF BANKRUPTCY. — MORTGAGE. — FRAUDULENT PREFERENCE. — A mortgage by a railroad company to secure all its creditors equally out of its earnings is not a fraudulent preference or an act of bankruptcy. *In re Union Pac. R. R. Co.*, Leg. Int., August 14, 1874.

4. SET-OFF. — PUBLIC POLICY. — An insurance company reinsured certain of its policies in another company and subsequently became insolvent. The company in which the reinsurance was effected purchased outstanding policies of the other company at a large discount. In a suit to recover the reinsurance it was *held*, that the purchase by the second company was not in excess of its corporate powers nor contrary to public policy. And that the policies purchased could be set off at their face value against the reinsurance. SWING, D. J., *Hovey* v. *Assignees, &c.* Am. Law Reg., August, 1874.

5. ACT OF '74 NOT RETROACTIVE IN RESPECT OF FRAUDULENT CONVEYANCES MADE PRIOR TO DEC. 1, 1873. — The amendatory act of June 22, 1874, cannot be construed to affect a fraudulent conveyance made prior to December 1, 1873.

HOPKINS, J, writes as follows: "In almost every case where the jury would be warranted in finding that the party 'had good reason to believe,' under the old statute, they would be justified in finding that he 'knew' under the amended law, so that practically the amendment is merely a verbal one in that respect. It is a rule of universal application, in all cases of fraud on the part of the debtor or seller of property, that notice of facts sufficient to put a party upon inquiry amounts in judgment of law, to notice, and is sufficient to charge the purchaser with *knowledge* of the matters and things it is reasonable to suppose such inquiry or investigation would have discovered. Inquiry on the part of the purchaser having such notice becomes a duty, and diligence an act of justice. A *scienter* may be shown by circumstances, and whatever fairly puts a party upon inquiry, when the means of knowledge are supposed to be at hand, if he omits to inquire, he does so at his peril, and he is chargeable with a knowledge of all facts which, by a proper inquiry, he might have ascertained. *Hamlin* v. *Pettibone*,[1] Central L. J., August 13, 1874; Albany L. J., August 29, 1874.

CONFEDERATE MONEY.

See TRUSTEE.

CONFEDERATE SERVICE.

See MORTGAGE.

CONSTITUTIONAL LAW.

1. UNCONSTITUTIONALITY OF THE LAW CREATING THE STATE BOARD OF EQUALIZATION OF CALIFORNIA. — The constitution of California contains the following provisions: "The powers of the Government of the State of California shall be divided into three separate departments — the Legislative, the Executive, and the Judicial." "The Legislative power of this State shall be vested in a Senate and Assembly." The Political Code contains the following section: "The State Board of Equalization must determine and transmit to the Board of Supervisors of each county the rate of state tax to be levied and collected, which, after allowing for delinquency in the collection of taxes, must be sufficient to raise the specific amount of revenue directed to be raised by the Legislature for state purposes."

Held, that said section of the Code was unconstitutional in that it attempted to confer upon the state board the power to add to the amount of tax to be levied by law; that the legislature had no power to commit to the board the exercise of functions which are confided by the organic law to the legislative branch and which pertain to it alone. *Houghton* v. *Austin*, Pac. Law Rep., Aug. 18, 1874.

2. TAXATION OF PROPERTY OF CORPORATIONS. — The constitution of Iowa contains the following provisions: "The property of all corporations for pecuniary profit shall be subject to taxation, the same as that of individuals." An act was passed, one section of which was as follows: "Every railroad company which shall have paid all taxes on gross earnings pro-

[1] An interesting review of this case antagonistic to the opinion of Judge HOPKINS, is published in the issue of the *Central Law Journal* for August 27, 1874.

vided for by chapter 106, of the acts of the Thirteenth General Assembly, shall be released from the payment of all other taxes which may have been levied upon the road-bed, right of way, track, rolling stock, and necessary buildings for operating their road, and no taxes for prior years for state, county, municipal, or any other purpose for which any tax can be levied under the laws of the State, up to the first day of January last, shall be collected from any such railroad company on such property." *Held*, that the act was a violation of the provision of the constitution quoted, in that it was a discrimination in favor of railroad corporations against individuals. *Davenport* v. *Chicago, &c. R. R. Co.*, West. Jur., August, 1874.

3. THE ACT AUTHORIZING the issue of bonds in aid of the Southern Normal University of Illinois is constitutional, the object being a public one. *Burr* v. *City of Carbondale*, Chicago L. N., July 25, 1874.

4. ACT AUTHORIZING ISSUE OF CRIMINAL WARRANTS WITHOUT PROOF OF PROBABLE CAUSE. — An act which authorized a state's attorney to file informations upon which criminal warrants were to issue, without proof of probable cause, held to be inhibited by the constitution of the State of Illinois. *People* v. *Brown*, Chicago L. N., Aug. 29, 1874.

CONTEMPT.

LETTER IN NEWSPAPER. — JURISDICTION OF COUNTY COURT JUDGE. — A judge of an English county court had summoned the applicant to answer for contempt of court in writing to a local newspaper a letter which contained reflections upon the judge's conduct in a case judicially before him: *Held*, upon a prohibition to restrain the judge from proceeding upon the summons, that a court of record of inferior jurisdiction has no authority to interfere summarily with contempts of this kind out of court. *In re Jolliffe*, Chicago L. N., Aug. 15, 1874.

CONTRACT.

EXECUTORY CONTRACT. — WARRANTY. — SALE WITHOUT DELIVERY. — A sold B a certain number of barrels of sugar by sample, at an agreed price, the sugar to be delivered when called for. No time was specified for the delivery, and there was no setting apart of the specific number of barrels sold. Shortly after the sale, within a reasonable time, B sent for the sugar, and upon opening it found it to be in an unmerchantable condition, whereupon he offered to return it and A declined to receive it. *Held*, that the contract was executory, and that the law would imply that the parties contemplated that the sugar should be of a fair and merchantable quality and raise a warranty to that effect; that the contract being executory, the law gave B a reasonable time in which to make a fair examination and see if the sugar answered the character of that called for by the contract; that what constituted a reasonable time was a question for a jury. And that if B failed to make the examination within such reasonable time he would be precluded from rescinding the contract, but would still have the right to rely upon the implied warranty in mitigation, or, in other words, would be liable only upon a *quantum meruit* for the goods. *Doane* v. *Dunham*, Mo. West. Jur., August, 1874.

See CORPORATION.

CORPORATION.

WHEN SIGNATURE OF PRESIDENT WILL BIND THE CORPORATION. — EVIDENCE. — CONTRACT. — A contract was made which began: "This indenture made ..... between A of Chicago, party of the first part, and B, President of the Northwestern Distilling Co. of the same place, party of the second part." In the body of the contract the parties were mentioned as of the first and second part, and the pronouns *he*, *his*, or *him* used to denote the party of the second part. One of the covenants was as follows: "And the said party of the second part further covenants with the said party of the first part, that at the expiration of the term, he will yield up the demised premises to the said party of the first part, in as good condition as when the same were entered upon by the said party of the second part," &c. The instrument concluded, "In testimony whereof, the said parties have hereunto set their hands and seals, the day and year first above written," and was signed and sealed: D. R. Brant, [Seal.] Northwestern Distilling Co., [Seal.] By Edward Lawrence, President. *Held*, that it might be shown that it was the intention of the corporation to make the contract, and that the action was properly brought against it. *N. W. Distilling Co.* v. *Brant*, Chicago L. N., Aug. 8, 1874.

See BANKRUPTCY, 4; CONSTITUTIONAL LAW, 2; ESTOPPEL; REMOVAL OF CAUSES.

CRIMINAL LAW.

1. TWICE IN JEOPARDY. — A defendant is placed in jeopardy, when he is regularly placed on trial. His jeopardy is real unless it shall subsequently appear that a verdict could never have been rendered by reason of the death or illness of the judge or juryman, or that after due deliberation the jury could not agree, or by reason of some other like overruling necessity which compels their discharge without the consent of the defendant. *People* v. *Hunckler*, Pac. Law Rep., Aug. 11, 1874.

2. STATE OFFICER. — BRIBERY. — A state senator is "an officer of the State" within the meaning of the statute of Kansas touching bribery. *State* v. *Pomeroy*, Cent. L. J., Aug. 20, 1874.

3. POSSESSION OF STOLEN PROPERTY AT UNSEASONABLE HOUR. — The larceny appeared to have been committed sometime during the night, and the property was found by the police in the possession of the defendant and another person with him, in a small boat managed by them, at half after three o'clock in the morning. *Held*, that the possession at that unseasonable hour for lawful traffic was, within the authorities, sufficient to maintain the presumption of the defendant's criminal agency in procuring it; that it was so recent, and so suspicious, that it was consistent with no other rational conclusion than that of guilt. — *Dillon* v. *The People*, Daily Reg., Aug. 27, 1874.

See CONSTITUTIONAL LAW, 4.

DEBTOR AND CREDITOR.

See BANKING.

ECCLESIASTICAL LAW.

OF PROCEEDINGS BY CHURCH COURTS IN THE UNITED STATES. — THE CHENEY CASE. — In the year 1869 the Rev. Mr. Cheney, at that time a presbyter of the Protestant Episcopal Church in the diocese of Illinois, and rector of Christ Church, in the city of Chicago, was presented for violation of the constitution and canons of said church. After a church court, composed of five presbyters, the number prescribed by the canons of said church, had been organized, a bill was filed to restrain such court from proceeding, and an injunction granted, which was dissolved upon appeal. In the mean time one of the presbyters of the church court became ineligible and a trial was had by four presbyters, which resulted in the conviction of the accused, and sentence of suspension was pronounced by the bishop of the diocese.

Notwithstanding the sentence the Rev. Mr. Cheney continued to act as rector of Christ Church, whereupon he was tried, under protest, in the year 1871, by a new church tribunal, for *contumacy*, of which charge he was found guilty and a sentence of deposition pronounced by the bishop in due form.

Disregarding the second sentence, also, Mr. Cheney continued in charge of Christ Church, whereupon suit was brought by the complainants, communicants of the Protestant Episcopal Church and pew-holders in said Christ Church, to restrain him from officiating as rector, and the vestrymen and wardens from permitting him to officiate as rector in said Christ Church, on the ground that said Cheney had been, in May, 1871, in due form and manner, in compliance with the laws of the Protestant Episcopal Church, put upon his trial for offences against the laws of said church, and upon said trial found guilty, and thereafter sentenced and deposed from the priesthood and ministry in said church; and that by reason of said deposition said Cheney had lost all right to the use of said church as rector, and the parsonage connected therewith, and the other defendants were perverting their trust in devoting the income of said church to the support of a deposed minister. The bill prayed for a perpetual injunction, restraining such use of the church property and such a diversion of the church income. *Held*, that the verdict of the first tribunal which consisted of only four presbyters, being one less than the number prescribed by canon, was a nullity, and that the verdict of the tribunal which found the accused guilty of contumacy was, consequently, equally void. The Rev. Mr. Cheney, therefore, had never been suspended or deposed and the bill was without equity.

The court discusses at great length divers points presented, affecting the jurisdiction of church tribunals, their relations to the civil courts, the powers of a bishop of the Protestant Episcopal Church in the United States, and other questions incidental to the cause. *Calkins* v. *Cheney*, Chicago L. N., August 22 and 29, 1874.

ESTOPPEL.

DECREE AT SUIT OF STOCKHOLDER WHERE THE CORPORATION WAS NOT A PARTY. — In an action in a state court by a city against a railroad corporation to collect certain taxes, the answer set up by way of estoppel a decree rendered in a United States court, at the suit of a stockholder, which enjoined the collection of the taxes in question. It did not appear that the suit was prosecuted for the benefit of the corporation or in its behalf, nor that the corporation knew of the pendency of the proceedings or claimed the benefit thereof. *Held*, that there was no estoppel; that the corporation was neither party nor privy to the suit; that the decree would not have bound the defendant if it had been adverse to the plaintiff therein, which was necessary to constitute it a bar to the present action, it being well settled that a former adjudication must have the effect to equally estop both parties to be conclusive. *Davenport* v. *Chicago R. R. R. Co.*, West. Jur., August, 1874.

See TAXATION, 2, 3.

EVIDENCE.

1. PROOF OF FRAUD. — An offer to prove the circumstances alleged to establish fraud should not be refused on the ground that the fraud complained of is merely inferential. *Fisher* v. *Doty*, Leg. Int., August 14, 1874.

2. THE COMPETENCY OF A WITNESS, not subject to objection before the passage of an act permitting parties to testify, is not affected by such an act. *McFerran* v. *Mont Alto Iron Co.*, Leg. Int., August 21, 1874; Leg. Chron., August 29, 1874.

3. THE CREDIBILITY OF AN ADVERSE WITNESS may be assailed by proof that he cherishes a feeling of hostility towards the party against whom he is called; and it may be established, by proof of the acts or declarations of the witness, provided his attention is first called to the particular acts or declarations proposed to be proved, with sufficient minuteness as to time and circumstance, to afford him an opportunity to explain. *Silvey* v. *Hodgden*, Pac. Law Rep., July 14, 1874.

4. WIFE AS WITNESS IN ACTION BY HUSBAND AND WIFE FOR INJURY TO LATTER. — In an action by husband and wife for injuries to the latter, the wife is a competent witness. *Harriman* v. *Stowe*, Cent. L. J., August 13, 1874.

5. DECLARATIONS TO PHYSICIAN AT TIME OF ACCIDENT. — A party who had sustained an injury stated to a physician shortly after the injury took place that it was caused by falling through a trap-door. *Held*, that such statement was admissible as part of the *res gestæ*. *Ib.*

6. EVIDENCE TO SHOW IMPROPER SPEED OF TRAIN NEAR RAILROAD CROSSING. — A witness testified that he saw a train, which ran against plaintiff's wagon, before it reached the crossing where the accident occurred, and at the distance therefrom of nine hundred feet, and that it was running at the rate of fifteen miles an hour, and no bell was rung or whistle sounded. The evidence was objected to as the train was not seen by the witness at the place of the accident. The object in introducing it was to show want of care on the part of the persons in charge of the train.

Held, that the evidence was competent, it being necessary to slacken speed at a distance from the point where thedesired rate is to be attained. It was for the jury to determine whether, in the exercise of proper care, the whistle ought to have been sounded or the brakes applied at the place where the train was when seen by the witness. *Black* v. *Burlington &c. R. R. Co.*, West. Jur., August, 1874.

See CORPORATION; PLEADING AND PRACTICE, 5.

FIXTURES.

HOUSE SET UPON BLOCKS. — PORTABLE FENCE. — A house set upon blocks which rest upon the surface of the ground, and which may be removed without disturbing the land, is not a part of the realty. Nor is a portable fence. *Tennybecker* v. *McDougal*, Pac. Law Rep., July 14, 1874.

FRAUDULENT CONVEYANCE.

A CONVEYANCE BY HUSBAND TO WIFE of his interest in real estate, subject to a lien of unpaid purchase money, at a time when he owed no other debts, is not fraudulent. *Nippe's App.*, Leg. Int., Aug. 28, 1874.

INDIAN LANDS.

THE GRANT OF THE OSAGE LANDS to the Leavenworth, Lawrence & Galveston Railroad Company expounded by Mr. Justice Miller. *U. S.* v. *L., L. & G. R. R. Co.*, Cent. L. J., Aug. 27, 1874.

INSURANCE.

1. DENIAL OF LIABILITY. — PROOF OF LOSS. — A denial of liability of the company to pay the loss is to be regarded as a waiver of proof of loss. *Parker* v. *Amazon Ins. Co.*, Ins. L. J., August, 1874.

2. A MISTAKE BY AN AGENT in filling out a policy does not vitiate it. *Ib.*

3. CONSTRUCTION OF POLICY. — MACHINERY. — The policy was issued on the "engine and machinery" contained in a building "used for the manufacture of tin-ware, sheet-iron, japanned and fancy painted ware." The plaintiffs claimed damages for the destruction of "642 forming and cutting machines," which appeared on trial to be "dies" used in the cutting screw and drop presses, &c. *Held*, that insurance on the "machinery" included all the essential parts of the machinery, and as the articles could not be manufactured without the dies, they were covered by the policy. *Seavey* v. *Central Mut. Fire Ins. Co.* Ib.

4. CONSTRUCTION OF "SANE OR INSANE." — A policy contained a condition that if the insured died by his own hand, sane or insane, the policy should be void. *Held*, that the plaintiff was bound by the condition, and the jury were instructed that if they believed that the insured took his own life, whether in the possession of his faculties or not, they should find for the defendant. *Snyder* v. *Mut. Life Ins. Co.* Ib.

5. MISREPRESENTATION IN APPLICATION. — In the application the question "Have you ever had any serious illness, disease, or personal injury?" was propounded. The answer was "Small-pox thirty years

since." It appeared that five years previously the assured had a severe fall upon his head, and was attended by a physician who treated the injury. *Held*, that there was such misrepresentation as to vitiate the policy. *Ib.*

6. CONSTRUCTION OF POLICY. — SPARK RISKS. — The policy covered certain wood and logs piled up along the line of a railroad, and was intended to insure only such property as actually belonged to the road, and not to cover "spark risks," or property belonging to others, for which the railroad company would be responsible if ignited by sparks from the engines. A large amount of wood not belonging to the railroad company was destroyed by fire from the engines, for which the company settled, and then brought suit against the defendant. *Held*, that there was nothing on the face of the policy to indicate that it was intended to cover anything more than the plaintiff's own property. *Monadnock R. R. Co.* v. *Man. Ins. Co.* Ib.

7. THE MISSPELLING OF PLAINTIFF'S NAME in the proof of loss is of no consequence as long as there is no doubt as to identity. *Hibernia Ins. Co.* v. *O'Connor*, Ib.

8. CONSTRUCTION OF MARINE POLICY. — A policy contained the following clause: "No vessel shall sail from the harbor of Gloucester after the 10th day of November next, on any voyage east of Cape Sable." On the 13th of November she sailed from Gloucester and was damaged on the 20th. It was admitted in evidence that she was provided with everything suitable for a fishing voyage except bait, and the plaintiffs claimed that she was on her way to Eastport to procure it, and as the voyage was to Eastport, she was covered by the policy. *Held*, that if the vessel was really intended for the fishing grounds, the putting in at Eastport to procure bait was merely an incident to the voyage, and did not interfere with its destination and purpose. *Friend* v. *Gloucester Mut. Fishing Ins. Co.* Ib.

See BANKRUPTCY, 4; PLEADING AND PRACTICE, 4.

INTERNAL REVENUE.

1. INTEREST CERTIFICATES. — SCRIP DIVIDEND. — The N. Y. Central Railroad Company, in pursuance of resolutions of its directors, issued certain "interest certificates" which ran as follows: "Under a resolution of the Board of Directors of the company, passed Dec. 19th, 1868, of which the above is a copy, the New York Central Railroad Company hereby certifies that —— ——, being the holder of —— shares of the capital stock of said company, is entitled to —— dollars, payable ratably with the other certificates issued under said resolution, at the pleasure of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid upon the shares of the capital stock of the company." *Held*, that such certificates were not to be regarded as stock or scrip dividends, and that a tax upon them as such was illegal. *N. Y. C. R. R. Co.* v. *Bailey*, Int. Rev. Rec., July 27, 1874.

2. TAXATION OF DIVIDENDS UNDER ACT OF JULY 14, 1870. — Section 15 of the Act of July 14th, 1870, made taxable those dividends which were declared for the earnings of the year 1871, and also those which were declared during that year, and limited the tax to those dividends only. The tax was to be imposed upon the dividends for that year, and

also upon the dividends declared during the year 1871, and was thereafter to cease. *Nat'l Park Bank* v. *Blake*, Int. Rev. Rec., Aug. 24, 1874.

JUDGMENT.

See ESTOPPEL; TAXATION, 3.

LEGAL REPRESENTATIVE.

See TRUST DEED.

MANDAMUS.

COMPTROLLER OF STATE. — A mandamus will not lie to the comptroller of a state to compel him to countersign bonds. S. C. of Texas. *Bledsoe* v. *International R. R. Co.*, Cent. L. J., Aug. 13, 1874.

MARRIED WOMAN.

DEED OF. — MISTAKES in the deed of a married woman cannot be corrected in equity. *Board of Trustees, &c.* v. *Davidson*, Mo. West. Jur., August, 1874.

See EVIDENCE, 4.

MISNOMER.

See INSURANCE, 7; NEW TRIAL.

MORTGAGE.

1. FORECLOSURE WHERE MORTGAGOR WAS IN CONFEDERATE ARMY. — NOTICE.—A, a resident of Missouri, entered the Confederate army in the year 1861. At the time of his doing so there were two mortgages upon certain real estate owned by him which were due, and, also, an overdue outstanding unsecured note. In 1862 and 1863 the mortgagees procured a foreclosure of their mortgages by constructive notice to A, on the ground that his place of residence was unknown; and the unsecured creditor obtained judgment upon the note by process of attachment.

After the lapse of more than three years, the time prescribed by a statute of Missouri within which a petition for review might have been heard, A filed his bill in a United States court praying that all the proceedings be declared void for want of jurisdiction, in that the orders of publication were false, and for other reasons. *Held*, that the bill was without equity; that A had been guilty of laches, and, in any aspect of the case, was not entitled to a decree. *McQuiddy* v. *Ware*, Chicago L. N., July 25, 1874.

See BANKRUPTCY, 3; TRUST DEED.

NATIONAL BANK.

See REMOVAL OF CAUSES, 2; TAXATION, 1.

NEGLIGENCE.

1. INJURY TO PASSENGER TRAVELLING ON FREE PASS. — A party travelling upon a pass conditioned as follows: "The person who accepts

and uses this free ticket thereby assumes all risk of accident, and agrees that the company shall not be liable under any circumstances, whether of negligence of its agents or otherwise, for any injury of the person, or for any loss or injury to his property, while using or having the benefit of it," was injured and brought an action for damages. *Held*, that the conditions of the pass did not protect the company from liability, even if the injury was caused by gross negligence on the part of the plaintiff. S. C. of Minn. *Jacobus* v. *St. P. & C. R. W. Co.*, Cent. L. J., July 30, 1874; Leg. Int., August 28, 1874; Albany L. J., August 8, 1874.

2. INJURY TO SERVANT BY DEFECTIVE MACHINERY. — Discussion of the liability of railroad companies where its servants are injured by defective machinery. *T. W. & W. R. R. Co.* v. *Frederick*, Chicago L. N., August 15, 1874.

NEW TRIAL.

WHERE PERSON NOT EMPANELLED HAS SERVED UPON THE JURY. — It is in the discretion of the court to grant a new trial in a case where a person not empanelled has served upon the jury, and the court will not grant such new trial unless substantial injustice has been done by a wrong juror having served.

An action came on to be tried before a common jury, and the name of Thomas *Fox*, being on the common panel, was called amongst others by the associate, whereupon one Thomas *Cox*, who was on the special jury panel, went into the box by mistake, served upon the jury, and took part in the verdict, which was given for the plaintiff. The defendant alleged afterwards that *Cox* was a friend of the plaintiff, and had purposely, and in the interest of the plaintiff, tendered himself as a juror, but this was denied by *Cox* in a letter written in answer to inquiries by the attorney of the plaintiff. *Held*, that it was in the discretion of the court to grant a new trial; and a rule for a new trial discharged. *Wells* v. *Cooper*, Leg. Int., August 28, 1874.

NOTICE.

See MORTAGAGE; SUNDAY.

NUISANCE.

A CHINESE LAUNDRY may be so conducted as to warrant the interposition of a court of equity to restrain it as a nuisance. *Warwick* v. *Wah Lee & Co.*, Leg. Int., August 21, 1874.

PLEADING AND PRACTICE.

1. RETURN BY SHERIFF. — FOREIGN JUDGMENT. — RECITALS OF SERVICE IN RECORD. — A return to a summons by a sheriff is not necessarily defective by reason of a failure to set forth that service was made in his county.

But in an action upon a judgment rendered in another state the defendant has a right to show by proof that he has never been served with process, notwithstanding recitals in the record to the contrary. *Knowles* v. *Logansport, &c. Co.*, Pac. Law Rep., July 21, 1874; Chicago L. N., August 1, 1874.

2. IN SUPREME COURT U. S. AS TO APPEAL OR WRIT OF ERROR. — Where all the defendants will be affected they must all join in the writ or appeal. *Simpson* v. *Greely*, Chicago L. N., August 15, 1874.

3. MAINTENANCE OF LUNATIC CRIMINAL. — The proper action by a county for money paid for the maintenance of a lunatic criminal is assumpsit. *Directors* v. *County of Mountour*, Leg. Int., August 28, 1874.

4. SERVICE AGAINST FOREIGN INSURANCE COMPANY. — Service of summons in a suit against a foreign insurance company upon a sub-agent appointed by a general agent is not good. *Diffenderfer* v. *North America Life Ins. Co.*, Ins. L. J., August, 1874.

5. EVIDENCE. — SURPRISE. — CONTINUANCE. — In a case of surprise by the introduction of testimony which may be contradicted a continuance should be allowed. *Beaumont* v. *Gray's Executors*, Mo. West. Jur., Aug. 1874.

See BANKRUPTCY, 1, 2; NEW TRIAL; REMOVAL OF CAUSES; REPLEVIN.

PORTABLE FENCE.

See FIXTURES.

PROMISSORY NOTE.

ACCOMMODATION INDORSER. — An accommodation indorser of a promissory note is to be regarded as an indorser in the usual legal sense. If there be more than one accommodation indorser, they sustain the same relations to each other as if the paper was an ordinary business note. The fact that each knew that the other was an accommodation indorser is immaterial in the absence of an agreement to share the liability. *Kirschner* v. *Conklin*, Am. Law Reg., August, 1874.

REMOVAL OF CAUSES.

1. A CORPORATION MAY REMOVE a case from a state to a federal court under the act of 1867. The necessary affidavit to procure the removal can be made by the proper officer of the corporation. Mr. Justice MILLER, DILLON, C. J. concurring. *Farmers' Loan, &c. Co.* v. *Marquillan*, West. Jur., August, 1874.

2. NATIONAL BANK. — A national bank may remove a cause from a state to a United States court. The act of July 27, 1868, does not take away such right. *Chatham Nat'l Bank* v. *Merchants' Nat'l Bank*, Daily Reg., August 24, 1874.

REPLEVIN.

DAMAGES cannot be recovered in an action of replevin. *Pennybecker* v. *McDougal*, Pac. Law Rep., July 14, 1874.

RES ADJUDICATA.

See TAXATION, 3.

RESPONDEAT SUPERIOR.

AN AGENT is responsible for his own misfeasance, negligence, or wrong. The doctrine of *respondeat superior* does not change his liability. *Harriman* v. *Stowe*, Cent. L. J., Aug. 13, 1874.

SET-OFF.

See BANKRUPTCY, 3.

SLANDER.

RULE AS TO WORDS WHICH IF TRUE SUBJECT PLAINTIFF TO INDICTMENT. — The slander complained of consisted in the words, "I saw her (plaintiff) in bed with A." Fornication was not an indictable offence where the suit was brought, and there was no averment or proof of special damage. *Held*, that the words were not actionable. *Pollard* v. *Lyon*, Pac. Law Rep., August 11, 1874.

SUNDAY.

NOTICE OF PROTEST RECEIVED UPON SUNDAY. — A notice of protest delivered to an indorser, personally, on Sunday, is void; and the receipt of such notice is not to be regarded as good upon the following day. To be valid, the notice must be given upon a lawful day. *Rheem* v. *Carlisle Deposit Bank*, Am. Law Reg., August, 1874.

TAXATION.

1. SHARES OF NATIONAL BANK. — WHERE TO BE TAXED. — The shares of a national bank are to be taxed where the bank is located. *Strong* v. *O'Donnell*, Leg. Int., Aug. 21, 1874; Leg. Gazette, August 28, 1874.

2. TAX ON GROSS EARNINGS OF RAILROAD BY STATE. — The payment by a railroad company of a state tax upon its gross receipts is not to be regarded as a bar to the collection of a tax by a city upon the property of the road within the limits of the city. *Davenport* v. *Chicago, &c. R. R. Co.*, West. Jur. August, 1874.

3. RES ADJUDICATA. — INJUNCTION RESTRAINING THE COLLECTION OF A TAX FOR ONE YEAR NO BAR FOR SUBSEQUENT YEARS. — A judgment was rendered in a competent court restraining the collection of certain taxes levied upon the property of the defendant for the years 1863, 1864, and 1865. It was contended that such judgment worked an estoppel to collect the taxes for subsequent years. *Held*, that each year's taxes constituted a separate cause of action, and that the determination of the matters involved in the injunction suit, and the judgment therein, reached no further than the taxes of the years in question. *Ib.*

See CONSTITUTIONAL LAW, 1, 2; INTERNAL REVENUE.

TRUST DEED.

"LEGAL REPRESENTATIVE" DEFINED. — SALE BY ADMINISTRATOR. — It was provided in a trust deed that in the event of the death of the trus-

tee the sale of the property should be made by his "legal representative." The trustee having died, and a default which authorized a sale arisen, the property was sold by the trustee's administratrix. *Held*, that the sale was irregular and not in compliance with the deed. That as there was no grantee or assignee, and hence no "legal representative," in the sense in which the term must be held to have been used in the deed, a new trustee should have been appointed, or the trust deed foreclosed by bill in chancery as an ordinary mortgage. *Warnecke* v. *Lembca*, Mo. West. Jur., August, 1874.

TRUSTEE.

Liability of. — Confederate money. — Where a guardian loaned money pertaining to his ward's estate and accepted payment in Confederate currency, he was held to be liable for the amount so loaned. But if any portion could not have been saved by the exercise of proper diligence during the war and afterwards, as to such portion there was no liability. *Ferguson* v. *Lowry*, Cent. L. J., August 20, 1874.

WARRANTY.

See Contract.

WILL.

Omission of name of residuary legatee. — A will was duly witnessed, a blank space being left for the name of the residuary legatee, which was subsequently inserted. *Held*, that the residuary bequest was no part of the will. *Derr* v. *Greenawalt*, Leg. Int., August 28, 1874.

DISTRICT COURT U. S. — SOUTHERN DISTRICT OF N. Y.

[July, 1874.]

BANKRUPTCY. — PRACTICE UNDER ACT OF JUNE 22, 1874. — PETITION BASED UPON FAILURE TO PAY COMMERCIAL PAPER FILED LESS THAN FORTY DAYS PRIOR TO PASSAGE OF SAID ACT.

IN RE THE TIVOLI BREWING CO.

Blatchford, J. The petition in this case, in involuntary bankruptcy, was filed June 19th, 1874. The only act of bankruptcy it alleges is the failure to pay commercial paper which fell due June 4th, 1874. As under the act of June 22d, 1874, no person can be adjudged a bankrupt for the failure to pay commercial paper, on a petition filed before the expiration of forty days from the maturity of the paper (instead of fourteen days, as under the former law), and as this provision applies to cases commenced since December 1st, 1873, this petition stands now as having been prematurely filed, and cannot be availed of after the expiration of the forty days, and cannot be amended, but must be dismissed, without costs.

SUPREME COURT OF ILLINOIS.

[TO APPEAR IN 63 ILL.]

JURISDICTION OF INFANTS. — "DUE PROCESS OF LAW" DEFINED.

CAMPBELL v. *CAMPBELL.*

In a proceeding for partition, in which the lands of infant defendants were ordered to be sold, there was no actual service of process on the infant defendants, but the court appointed a guardian ad litem, who answered for them: Held, that the court had no jurisdiction of the persons of such defendants.

Although the forty-seventh section of the chancery statute seems to authorize a decree against infant defendants without service of process on them, yet the court holds that the legislature has not the power to authorize a court to take the title of any one without notice, actual or constructive, to appear and defend.

The words "due process of law," in the clause of the constitution forbidding the divestiture of title except by due process of law, has reference to judicial proceedings according to the course and usage of the common law, which must always be based upon notice. The appointment of a guardian ad litem for an infant defendant, who has had no notice of the suit, is not due process of law.

Mr. Chief Justice LAWRENCE delivered the opinion of the court: —

In this case the summons against the infant defendants was returned not served, but, nevertheless, the court proceeded to appoint a guardian *ad litem*, who filed the usual answer, and the court decreed a sale of the land. This court said, in *McDurmaid* v. *Russell*, 41 Ill. 490, and in *Hickenbotham* v. *Blackledge*, 54 Ib. 318, that infant defendants must be served before the court can acquire jurisdiction over them. It is true, the forty-seventh section of the chancery statute seems to authorize a decree without service, but we think the practice has rarely been adopted. Certainly no argument is necessary to demonstrate that the legislature cannot authorize a court to take the title of any one without notice, actual or constructive, to appear and defend. A judicial decree pronounced without jurisdiction is void. Jurisdiction over parties is only obtained by notice, actual or constructive. These are elementary principles. Yet this statute seems to authorize a court to appoint a stranger as guardian *ad litem* for an infant, and then to sweep away his estate without notice to him or defence in his behalf, as the guardian *ad litem* generally knows nothing of the facts and takes no interest in the suit. It may be asked, what is service on an infant worth? The answer is, that notice is thus given to his family, his kindred, or his guardian, and they will see that his rights are protected. But to allow the estate of an infant to be decreed away without notice to his natural or legal protectors, and upon the mere appointment of an utter stranger as a nominal guardian for the suit, is a violation of all the safeguards which the constitution has erected for the security of property, and especially of that provision which forbids the divestiture of title except by due process of law. Such a proceeding is not due process of law, as that has reference to judicial proceedings according to the course and usage of the common law, and must always be based upon notice.

These principles are so elementary, and have become so familiar by frequent decisions, that it is unnecessary to consume time in discussing them or to cite authorities in their support. Probably no person would contend that a court could acquire jurisdiction over an adult defendant without notice, by ordering an attorney of a court to enter his appearance; and we can see no difference in principle between such a case and one where the court seeks to acquire jurisdiction by appointing a guardian *ad litem* for an infant, and requiring him to file an answer.

The decree of the court below is reversed and the cause remanded.

NOTES OF NEW BOOKS.

FORMS AND PRACTICE, *or American Precedents in Personal and Real Actions*, is the title of a new work by Benjamin L. Oliver, Esq., published by Dresser, McLelland & Co., of Portland. Price $7.50

MESSRS. W. H. & O. H. MORRISON, of Washington, have ready 18th Wallace.

THE SAME PUBLISHERS have in press and will shortly issue the first volume of Mr. Justice Miller's series continuing *Curtis's Decisions*.

AN ATTRACTIVE LITTLE WORK upon patents, entitled *Manual of Patent Law*, by William E. Simonds, Esq., has recently been issued. It is only objectionable as seeking to simplify a very difficult subject — "the metaphysics of the law." It will, however, be read with profit and interest, especially by inventors.

MRS. MYRA BRADWELL, Editor of the *Chicago Legal News*, has published the second volume of *Reports of Examination of Law Students for Admission to the Bar* as conducted by the supreme court of the State of Illinois. The object of the book is to give an idea of the requirements of the court. Price, in paper, 75 cents.

THE FOURTH VOLUME of the *United States Digest*, new series, Little, Brown & Co. publishers, is ready for delivery.

CIVIL LIBERTY AND SELF-GOVERNMENT. A third edition of this great work edited by Theodore Dwight Woolsey, has been issued from the press of J. B. Lippincott & Co., of Philadelphia.

MESSRS. LITTLE, BROWN & CO. announce editions of *Indermur's Epitome of Leading Common Law Cases; Roscoe's Digest; Fearne on Remainders; Burge's Commentaries on the Law of Suretyship.* Also a new edition of *Perry on Trusts*, and *Chaplain on the Criminal Law and Procedure of Massachusetts.*

They are prepared to supply the third volume of the new *United States Digest; Story on Contracts*, fifth edition; volumes XI. and XII. of *Clark & Finnelly's Reports*, and *Law Reports, Cr. Cases Reserved*, 1865 to 1872.

MESSRS. ROBERT CLARKE & CO., Cincinnati, will have ready before the close of the present month the complete republication of *Ohio* and *Ohio State Reports*, in forty-three volumes. Price $107.50.

During the period covered by these Reports a succession of eminent judges presided in the supreme court of Ohio, whose decisions are distinguished for ability, learning, and laborious research. The series occupy deservedly a high rank as useful repositories of sound law, and as such are valuable to every practitioner.

THE FIRST VOLUME of *Green's Criminal Law Reports*, a series which promises to be very popular, is now ready, see advertisement upon another page.

THE AMERICAN LAW TIMES.

NEW SERIES. — NOVEMBER, 1874. — VOL. I., NO. 11.

DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. ..... *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & Co.
Am. Law Rec. ..... *American Law Record*, Cincinnati, O., H. M. MOOS.
Am. Law Reg. ..... *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & Co.
Cent. L. J. ..... *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.
Chicago L. N. ..... *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS Co.
Daily Reg. ..... *Daily Register*, New York, 303 BROADWAY, N. Y.
Ins. L. J. ..... *Insurance Law Journal*, New York, C. C. HINE, 176 BROADWAY.
Int. Rev. Rec. ..... *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
Leg. Chron. ..... *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
Leg. Gazette ..... *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.
Leg. Int. ..... *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
Mo. West. Jur. ..... *Monthly Western Jurist*, Bloomington, Ill., THOMAS F. TIPTON.
Pac. Law Rep. ..... *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
Pittsb. L. J. ..... *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
West. Jur. ..... *Western Jurist*, Des Moines, Iowa, MILLS & Co.

ADMINISTRATOR.

UNTIL AN ADMINISTRATOR HAS QUALIFIED and filed his bond, his appointment is *in fieri*. *Prior* v. *Downey*, Pac. Law Rep., Aug. 25, 1874.

ADMIRALTY.

1. COLLISION BETWEEN SAILING VESSELS. — Two sailing vessels, the Hazell Dell and Victoria, close hauled and having the wind on different sides, were beating up a narrow inlet against a head wind, when a colli-

sion took place. *Held:* 1. That by the 12th and 17th Articles of the Rules and Regulations for preventing Collisions (13 Stat. 58), it was the duty of the Hazel Dell — the wind on her port side and being the overtaking vessel — to give way and to keep out of the way of the Victoria. 2. That whilst by the 18th Article the Victoria, under ordinary circumstances, was entitled to hold her course, she was bound by the 19th Article, from the special circumstances of the particular case, to depart from the rule in order to avoid the immediate danger. 3. That the evidence brought the case within the principles of *The Maria Martin* (12 Wall. 31), and the damages caused by the collision should be divided equally between the libellant and respondent. *French* v. *The Victoria*, Leg. Int., Sept. 11, 1874.

2. THE MISSOURI RIVER, near its upper part in the Territory of Dakotah, is within the admiralty jurisdiction of a United States court. *Commings* v. *The Ida Stockdale*, Pittsburg L. J., Sept. 9, 1874.

3. DUTY OF TUG during a storm considered. *The Clematis*, Chicago L. N., Sept. 12 1874.

4. COLLISION. — RINGING BELL INSTEAD OF SOUNDING FOG-HORN. — A steamer running at an undue rate of speed during a fog collided with a sailing vessel. The evidence showed that the latter was moving slowly, and that she was ringing a bell instead of sounding a fog-horn, as prescribed by law. *Held*, that, under the circumstances of the case, the failure of the sailing vessel to observe the rules must be regarded as a contributing cause and the fault adjudged to be mutual, with damages accordingly. *The Pennsylvania*, Leg. Gazette, Sept. 25, 1874.

5. SHIPPING ARTICLES. — SPECIFICATION OF PORTS. — Under the Merchant Shipping Act of England of 1873, the shipping articles need only specify the maximum duration of the engagement of a seaman, and the places or parts of the world to which it does not extend: *Held*, that a specification of the places to which the voyage or engagement might extend was an implied agreement that it was not to extend to any other, and therefore a sufficient compliance with the act. *The Hermine*, Chicago L. N., Sept. 5, 1874.

6. SUIT BY FOREIGN SEAMEN. — JURISDICTION. — A court of admiralty will not decline jurisdiction of a suit by foreign seamen against a foreign vessel to recover wages, where it appears that the voyage has been completed or broken up, or the seamen have been discharged by the wrongful act of the master. *Ib.*

7. DESERTION DEFINED. — A seaman is bound to stay by the vessel according to his agreement, whether the master takes any means to compel him to do so or not; and therefore where seamen leave a vessel before the completion of the voyage, although with the knowledge of the master, and upon his promise that they shall not be arrested therefor, but without his consent, they are guilty of desertion. *Ib.*

8. INJURY TO SEAMAN BY NEGLIGENCE OF MASTER. — To render an employer liable for injury to one in his employ, through the negligence of another person also in his employ, it must be shown that the latter was not merely a fellow-workman, but was placed in a position of such authority as fairly to represent the employer himself. The captain of a merchant ship under his control and management is not a mere fellow-work-

man of the seamen on board, bound to obey him, but is such an agent or representative of the owner of the vessel, that the latter, by whom he has been appointed, will be liable for an injury to a seaman, sustained by him through the captain's negligence during the voyage, while the seaman is acting in obedience to an order given by the captain. *Ramsay* v. *Quinn*, Cent. L. J., Sept. 24, 1874.

See PLEADING AND PRACTICE, 4.

AGENT.

See PRINCIPAL AND AGENT.

ATTACHMENT.

See HUSBAND AND WIFE, 5; PLEADING AND PRACTICE, 7.

BANKRUPTCY.

1. PRACTICE UNDER ACT OF 1874. — VERIFICATION OF PETITION. — AGENT. — AMENDMENT. — Under section 12 of the Act of '74 where there are less than five signers to a petition in involuntary bankruptcy, and the petition is verified by an agent, the residences of principals need not be stated.

But where there are several signers who do not stand in the same right, the verifications must be severally sufficient. Thus a verification in the following words: "I, Samuel Heavenrich, being duly sworn says, that he is one of the firm of Heavenrich Bros., of Detroit, Michigan, and makes this affidavit in their behalf; that he is also agent for L. Morris, Dessar, Stern & Co., and Meyer & Schwab, and has full power and authority from them to make this petition — do hereby make solemn oath that the statements contained in the foregoing petition, by me subscribed, are true of my own knowledge, so far as the same are stated on my own knowledge, and that those matters which are stated therein on information and belief, are true according to the best of my knowledge, information, and belief," is insufficient.

But as the jurisdiction of the court does not depend upon the verification, the insufficiency may be cured by amendment. *In re Simmons*, Cent. L. J., Sept. 3, 1874.

2. BILL IN EQUITY BY ASSIGNEE OF BANKRUPT CORPORATION TO COLLECT ASSESSMENTS UPON STOCK. — The assignee of an insolvent corporation cannot maintain a bill in equity against the stockholders to collect assessments upon unpaid stock. The proper course would seem to be for the court to order an assessment to be collected by the assignee. *Myers, Assignee*, v. *Seeley*, Cent. L. J., Sept. 10, 1874.

3. "COMMENCEMENT OF PROCEEDINGS" DEFINED to mean the filing of a petition sustained by proofs of the alleged act of bankruptcy, and of the claim of the petitioning creditor. *In re Rogers*, Cent. L. J., Sept. 17, 1874.

4. PARTNERSHIP. — Parties holding themselves out to the world as partners may be adjudged bankrupts as such. *Richardson* v. *McFarland*, Am. Law Rec., Sept. 1874.

CORPORATION.

DEED OF. — A corporation cannot execute a deed otherwise than under its seal; nor can it make a deed unless the directors meet as a board and so determine. The only evidence of such meeting and action is the record kept by the secretary. *In re St. Helen's Mill Co.*, Pac. Law Rep., Sept. 8, 1874.

See BANKRUPTCY, 2; PLEADING AND PRACTICE, 2.

CRIMINAL LAW.

SALE OF INTOXICATING LIQUORS. — INSTRUCTIONS OF COURT. — The court instructed the jury as follows: "If you find that the defendants sold any of the intoxicating liquors named in the instrument, at the times and places named therein, notwithstanding they may have put into it roots and tinctures, unless it changed the nature or character of the liquors, so that it was no longer whiskey or brandy, or whatever it may have been originally, at the time of the sale, it was a violation of law. If its distinctive character as an intoxicating liquor was so destroyed that it could not be used as a beverage, and it became in fact a medicine to be used for diseases, and of such a character that it could not, in reason, be styled or used as an intoxicating drink, its sale was not a violation of law." *Held*, in the appellate court, to be a correct statement of the law. *State* v. *Laffer*, West. Jur., Sept. 1874.

See EVIDENCE, 4, 5; HUSBAND AND WIFE, 3.

CUSTOMS.

UNDER-VALUATION. — FALSE INVOICE. — *Held*, that it was error to refuse to admit the invoice of a previous shipment at a higher valuation as evidence that the claimant had guilty knowledge of the under-valuation in this case, and also in the instruction given to the jury that they could not return a verdict for the United States even if they found that the invoice value of the merchandise, as given in the invoice presented to the collector, did not conform to the value of such goods in the actual markets of the country of production, unless they should also find that such discrepancy was not the result of honest error on the part of the owner, consignee, or agent in respect to matters of law or fact, but that it was made knowingly and with design to evade the payment of the duty which he knew was legally chargeable on said merchandise. This instruction to the jury is directly opposed to the rule adopted by the unanimous decision of the supreme court. *United States* v. 146,650 *Clapboards*, Int. Rev. Rec., September 28, 1874.

DAMAGES.

WHERE LAND IS CONDEMNED FOR PUBLIC PURPOSE. — The theory of the statute of California is that the land-owner shall receive a fair, just compensation for the damage he suffers; and if that portion of his tract which is not taken will be enhanced in value, his damages will be diminished to the extent of the enhancement; and hence the statute contem-

plates that by deducting this benefit from the damages, the sum which remains will constitute a "just compensation" in the sense of the constitution. *Cal. Pac. R. R. Co.* v. *Armstrong*, Cent. L. J., Sept. 10, 1874.

See EMINENT DOMAIN.

DISTRICT ATTORNEY.

See PERCENTAGES.

EMINENT DOMAIN.

WHERE PROPERTY IS CONDEMNED FOR RAILROAD PURPOSES AFTER THE TRACK HAS BEEN LAID, the track is not to be regarded as a part of the realty to be estimated in computing the damages. The law contemplates "just compensation," no less and no more. *Cal. Pac. R. R. Co.* v. *Armstrong*, Cent. L. J., September 10, 1874.

EVIDENCE.

1. PURCHASE OF BUSINESS AND PROMISE TO PAY DEBTS. — A purchased the business of B, assuming to pay his debts. C, a creditor of B, brought suit upon A's promise against A. *Held*, that it might be shown that at the time A made the purchase, B exhibited a list of his debts, on the strength of which the purchase and promise to pay B's debts were made, and that such list did not include C's debt. *Torrent* v. *Campbell*, Leg. Int., September 4, 1874.

2. WHERE A DEFENDANT CALLS A PLAINTIFF as a witness the examination may be conducted as if the witness was under cross-examination. *Brubaker's Adm'rs* v. *Taylor*, Leg. Int., September 25, 1874.

3. RECORDED DEED. — BURNT RECORDS. — EFFECT OF RECORD. — An original deed, bearing certificate of having been duly recorded, is the highest class of evidence, and may be read whether the official record book be in existence or not.

Where a record of deeds is destroyed, the index book in which the deed is described, and its record in the proper book certified, is good evidence of the fact that a deed was recorded.

The notice which the due recording of a deed gives to all the world is not extinguished or lost by the destruction of the record book; nor can one who obtains adverse title be deemed an innocent purchaser. *Alvis* v. *Morrison*, Chicago, L. N., September 12, 1874.

4. FLIGHT IN CRIMINAL CASE. — Evidence of flight is not admissible as a badge of guilt; but it may be properly shown that there was a pursuit during which stolen property, not found upon the person of the accused when arrested, might have been thrown away. *People* v. *Collins*, Pac. Law Rep., September 1, 1874.

5. PARDON DEFINED. — The record of the conviction and sentence of a witness having been introduced, he submitted a document signed by the governor purporting to have been executed in pursuance of law, by which the release of witness was ordered upon a particular day; and it was further ordered that upon the same day he be "restored to all the rights and privileges of citizenship to which he was entitled before the aforesaid con-

viction and imprisonment." *Held*, that the order did not amount to a pardon. *Blane* v. *Rodgers*, Pac. Law Rep., September 1, 1874.

6. DEPOSITION TO IMPEACH WITNESS, TAKEN UNDER COMMISSION AT THE EXECUTION OF WHICH WITNESS WAS NOT EXAMINED. — Where a witness denies a conversation with A, A's deposition may be received to impeach the witness although taken under a commission at the execution of which the witness was not examined. *Pittsburg, &c. R. R. Co.* v. *Andrews*, Am. Law Reg., Sept. 1874.

HOMESTEAD EXEMPTION.

See HUSBAND AND WIFE.

HUSBAND AND WIFE.

1. HOMESTEAD EXEMPTION. — ALIENATION BY HUSBAND WITHOUT CONSENT OF WIFE. — In the State of Tennessee it is now a rule of property, made permanent by the fundamental law, that every head of a family is deprived of the right to alienate the homestead, unless his wife joins in the conveyance. It follows that such conveyance is absolutely void, and communicates no title to the purchaser, so far as it abridges or interferes with the wife's homestead right, and the wife, by her next friend, has such an interest in the preservation of the homestead, as entitles her to invoke the protection of a court of chancery, by bill *quia timet*, to have the cloud upon her right removed, and her homestead rights declared. *Williams* v. *Williams*, Cent. L. J., Sept. 24, 1874.

2. CONSTRUCTION OF "LIVING APART FROM HUSBAND." — "Living apart from husband" means, in contemplation of law, a permanent abandonment or separation. *Tobin* v. *Galvin*, Pac. Law Rep., Sept. 1, 1874.

3. COERCIVE PRESENCE OF HUSBAND. — A married woman cannot be convicted for selling liquor without license where the husband is coercively present — that is, in and about the house where the selling was done. *Commonwealth* v. *Lindsey*, Leg. Chron., Sept. 12, 1874.

4. TORTS OF WIFE. — The statute of Illinois known as the "Married Woman's Act," which gives the wife sole control of her separate estate and her own earnings for labor performed for any person other than her husband or minor children, with the right to use and possess the property and earnings, free from the control or interference of her husband, has the effect of discharging the husband from liability for the torts of the wife committed out of his presence and without his participation. *Martin* v. *Robson*, Am. Law Rep., Sept. 1874.

5. PARTNERSHIP OF WIFE. — EFFECT OF ASSISTANCE OF HUSBAND IN BUSINESS, ETC. — ATTACHMENT. — A married woman has not capacity to enter into a general mercantile partnership not connected with or relating to her separate property, and where she assumes to do so with the consent of her husband, and is by him assisted in managing and carrying on the business, the husband, and not the wife, is to be regarded in law as the partner.

A *feme covert* having obtained a "permit" to trade within the lines of the army, with the knowledge and consent of her husband entered into a partnership with other persons, for the purpose of buying and selling

goods and merchandise under said "permit," and herself, with the assistance of her husband, managed and conducted the business. The firm was subsequently dissolved, and its property transferred by the other partners to her, she agreeing to pay all the partnership debts. She then sold the property to S., who had notice of all the facts, and who in like manner agreed to pay the partnership debts. This was all done with the knowledge and concurrence of the husband, who joined her in executing the bill of sale to S. In an action by a creditor of the firm against the *husband* and the other members of the firm, not including the wife: *Held*, that the goods in the hands of S., or the price agreed by him to be paid therefor, and not yet paid, are liable to attachment in the action. S. C. of Ohio, *Swasey* v. *Antrain*, Am. Law Reg., Sept. 1874.

INSURANCE.

1. CANCELLATION OF POLICY. — SECRETARY OF COMPANY. — Upon the non-payment of certain assessments the secretary of an insurance company wrote the insured a letter which contained the following: "If you have paid the agent you are all right. If not, the company will renew the policy when it is paid," and other similar statements. *Held*, that the letter was to be regarded as a cancellation of the policy. And that the secretary of the company was the proper organ of communication between the company and its policy holders. *Columbia Ins. Co.* v. *Masonheimer*, Leg. Int., Sept. 11, 1874; Pittsb. L. J., Sept. 22, 1874; Leg. Chron., Sept. 26, 1874.

2. RETROACTIVE CONTRACTS OF INSURANCE are as valid as those having relation to the future only, if the intent of the parties is clear, and the insured and insurer were both ignorant of the loss at the time of making the contract. *Mercantile Ins. Co.* v. *Folsom*, Leg. Gazette, Sept. 4, 1874.

3. CONCEALMENT. — The non-disclosure of a void tax title is immaterial. So is the failure to disclose that the title of the property insured is in litigation. *Cheek* v. *Columbia Fire Ins. Co.*, Cent. L. J., Sept. 17, 1874.

4. WHERE THE COMPANY'S AGENT FILLS OUT THE POLICY any failure to state facts disclosed to him is a failure by the company which does not affect the policy. *Ib.*

JURISDICTION.

FORCIBLE ENTRY AND DETAINER is a "suit of a civil nature," within the meaning of the act of 1789, of which a United States court has jurisdiction. *Wheeler* v. *Bates*, Chicago L. N., Sept. 19, 1874.

See ADMIRALTY, 6; PLEADING AND PRACTICE, 3.

LAND GRANT.

CENTRAL PACIFIC RAILROAD GRANT. — MEXICAN GRANT. — RESERVED LANDS. — CONFIRMATION. — PATENTEE AS TRUSTEE. — The grant of alternate sections of land to the Central Pacific Railroad Company, under section 3 of the Act of Congress of July 1, 1862 (12 Stat. 492), is a *present* grant of the number of sections designated, which became specific and attached to every alternate section subject to grant,

lying within the prescribed limits, as soon as the line of the road became "definitely fixed."

The grant having attached to the alternate sections the moment the line of the road became "definitely fixed," could only be defeated by a failure of the grantee to perform the conditions subsequent of building the road within the time, and in the mode prescribed.

The fact that some of the alternate sections within the prescribed limits of the grant, at the time the line became "definitely fixed," were situate within the exterior limits of land claimed under an invalid Mexican grant, does not constitute such land "reserved" lands within the meaning of that term, as used in said section three of said act. Lands lying within the exterior boundaries of land claimed under an invalid Mexican grant were a part of the domain of the United States on July 1, 1862, and were not, by reason of such claim *only*, within any of the exceptions mentioned in the act of Congress of that date, or of any of the acts supplementary thereto, granting lands to aid in the construction of the Pacific railroads, and the alternate sections of such lands, lying within the prescribed limits, to which no other right had attached at the time the line of the road became "definitely fixed," were within the terms of the grant to the railway company, and the title thereto became irrevocably vested in said company upon the performance of all the conditions prescribed by said several acts.

A decree rejecting a claim to lands under a Mexican grant, in proceedings had for a confirmation under the act of 1851, to settle land titles in California, is an adjudication between the claimant and the United States that the claimant had no title, legal or equitable; and that, as to said claim, the land was always a part of the public domain of the United States, from the date of its cession by Mexico.

When the title to lands vested in the Central Pacific Railroad Company and its assignees, under the act of Congress of 1862, to provide for the construction of the Pacific railroads, and a patent to the same has been subsequently wrongfully issued to another party, a court of equity will convert the patentee in such patent into a trustee for the party in whom the title vested under the act, and compel him to convey such title as he acquired by the patent. *Sanger* v. *Sargent*, Pac. Law Rep., Sept. 22, 1874.

NEGLIGENCE.

A PASSENGER ON A RAILROAD PERMITTING HIS ARM TO PROJECT OUT OF THE CAR WINDOW is guilty of such negligence that if injured by an obstacle too near the track he cannot recover. *Pittsburg, &c. R. R. Co.* v. *Andrews*, Am. Law Reg., Sept. 1874.

See ADMIRALTY, 8.

PACIFIC RAILROAD.

See LAND GRANT.

PARDON.

See EVIDENCE, 5.

PARTNERSHIP.

WHAT CONSTITUTES A PARTNERSHIP IN NEW YORK. — The test of partnership in the State of New York is a community of profits — a specific interest in the profits as profits — in contradistinction to a stipulated portion of the profits as a compensation for services. *Leggett* v. *Hyde*, Daily Reg., Oct. 8, 1874.

See BANKRUPTCY, 4; HUSBAND AND WIFE, 5.

PERCENTAGES.

PERCENTAGES OF UNITED STATES ATTORNEYS AND CLERKS. — The Act of June 22, 1874, to repeal moieties, &c., does not affect the right of district attorneys and clerks of United States courts to receive the percentages allowed them on moneys collected for the United States. *U. S.* v. *One Horse*, Int. Rev. Rec., Aug. 31, 1874.

PLEADING AND PRACTICE.

1. PRACTICE IN SUPREME COURT UNITED STATES. — Where there is a general finding in the court below, upon a submission of the facts, the rulings of the court during the progress of the trial are alone open to review in the supreme court of the United States. *Mercantile Ins. Co.* v. *Folsom*, Leg. Gazette, Sept. 4, 1874.

2. A STOCKHOLDER MAY BRING A SUIT when a corporation refuses to do so; but the corporation must be made a party. *City of Davenport* v. *Dows*, Leg. Gazette, Sept. 4, 1874.

3. TERRITORY. — POWER OF LEGISLATURE, ETC. — The declaration, in the organic act by which a territory is created, that the courts of such territory shall have jurisdiction over both legal and equitable remedies, without prescribing how they shall be exercised, warrants the territorial legislature in uniting the two jurisdictions. The practice, pleadings, and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, subject to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the territorial assemblies, and to the regulation which might be adopted by the courts themselves. *Hornbuckle* v. *Toombs*, Leg. Gazette, Sept. 18, 1874.

4. ADMIRALTY. — ALLEGATIONS IN LIBEL. — It is not necessary to allege in a libel "that the vessel is of twenty tons burden," nor that she was "enrolled for the coasting trade," nor that she "was employed in the business of commerce," &c. And it is sufficient to describe a ship as "the ship A." *McMarren* v. *Kean*, Chicago L. N., Sept. 5, 1874; Cent. L. J., Sept. 10, 1874.

5. WHERE ONE DEFENCE HAS BEEN made in the lower court it must be adhered to on appeal. *Cheek* v. *Columbia Fire Ins. Co.*, Cent. L. J., Sept. 17, 1874.

6. EQUITY PRACTICE IN UNITED STATES COURTS. — REPLICATION. — "It was suggested that many cases are actually heard in this court without replications, the bar not being generally familiar with the equity rules. This is doubtless so, the members acting in some cases upon the assump-

tion that the practice in equity cases, as at law, is governed by the state practice. When no objection is made for want of replication, the court has not taken the trouble to see that the rule has been strictly complied with. The rules of the court, however, are very simple and plain, and must be observed." SAWYER, J. *Robinson* v. *Saterlee*, Pac. Law Rep., September 8, 1874.

7. DEATH OF ONE OF THE DEFENDANTS. — JUDGMENT. — ATTACHMENT. — GARNISHMENT. — Where one of the defendants, in an action on a joint contract, dies before judgment, and the judgment is taken against all the defendants, without any suggestion of his death, or making his representatives parties, such judgment is not void, but merely voidable, and is a determination of the action, within the meaning of sections 218 and 219 of the Code, authorizing an action by the plaintiff in attachment against the garnishee. *Swasey* v. *Antram*, Am. Law Reg., Sept. 1874.

See BANKRUPTCY, 1, 2, 3; EVIDENCE, 5; JURISDICTION.

PRINCIPAL AND AGENT.

RIGHT OF PRINCIPAL TO RECOVER PROFITS MADE WITHOUT HIS KNOWLEDGE OR CONSENT. — Defendant was employed as broker by plaintiff to negotiate for the purchase of a ship on the basis of an offer for £9,000, but eventually the ship was purchased through the defendant for £9,250. Some time prior to the sale an arrangement had been made between the vendor and a broker named S., through whom the ship was sold, that if S. could sell the ship for more than £8,500 he might retain for himself the excess over that sum. Defendant, who at the time he was negotiating for the purchase knew of this arrangement, which was unknown to the plaintiff, received after the completion of the purchase from S. the sum of £225, as his share of the excess. Plaintiff having brought an action for money had and received to his use to recover the sum of £225 so received by the defendant, the jury found (1) that defendant was plaintiff's agent for the purpose of purchasing the ship as cheaply as she could be got; and (2) that the plaintiff could have got the vessel cheaper but for the arrangement between the vendor and S. *Held*, that the plaintiff was entitled to recover from the defendants the £225, on a count for money had and received. *Morrison* v. *Thompson*, Albany, L. J., Sept. 19, 1874.

See BANKRUPTCY, 1.

PRINCIPAL AND SURETY.

WHERE SURETY SIGNS UPON CONDITION THAT OTHERS SHALL SIGN. — Where a party signs and delivers his bond as a surety upon the express condition that others shall sign it as co-sureties, unless this condition is complied with it cannot be enforced against him. S. C. of Penna., *Warfel* v. *Frantz*, Leg. Int., September 11, 1874; Pittsb. L. J., September 22, 1874. To the contrary is *Tidball* v. *Halley*, Pac. Law Rep., September 1, 1874, citing *Dair* v. *United States*, 16 Wall. 1, and other cases.

RIPARIAN RIGHTS.

ERECTION OF EMBANKMENT. — NUISANCE. — A part of the city of

San Jose being subject to overflow in periods of floods, as was alleged, by reason of the existence of an embankment upon the defendants' land, a bill was filed by the city to have the embankment abated as a nuisance. The defendants replied that their embankment was not the real cause of the inundations of the city but that the same were to be attributed to the effects of extraordinary freshets, &c. The court announces the principles governing the case, giving judgment for the defendants. *San Jose* v. *Parr*, Pac. Law Rep., August 25, 1874.

SHIPPING.

BILL OF LADING. — EXCEPTION AGAINST LOSS BY THIEVES, BARRATRY, ETC. — DAMAGE CAPABLE OF BEING COVERED BY INSURANCE. — Plaintiffs shipped on board defendant's ship at Liverpool for New York certain boxes of diamonds, under bills of lading, excepting amongst other things, "robbers, thieves, barratry of the master and mariners," and containing a clause that "the ship-owner is not liable for any damage to any goods which are capable of being covered by insurance." One of the boxes of diamonds was stolen when on board the ship, either on the voyage or after her arrival in port, before the time for delivery arrived, but there was no evidence to show whether they were stolen by one of the crew or by a passenger, or, after her arrival, by some person from the shore.

Held: 1. That "damage to any goods" in the insurance clause did not apply to the case of a total abstraction of the goods. 2. That the word "thieves" applied, as in policies of insurance, only to thieves external to the ship, and not to a passenger or one of the crew. 3. That the onus of showing that the loss came within one of the exceptions lay upon the ship-owners, and not the shipper; and that as the defendants had failed in showing that, the plaintiffs were entitled to recover. *Taylor* v. *Liverpool, &c. Steam Co.*, Albany L. J., October 3, 1874.

See ADMIRALTY, 5, 6, 7.

SLANDER.

AMBIGUOUS WORDS are to be construed in the sense in which they were understood by those who heard them. And it is for a jury to decide how they were understood. *M'Laughlin* v. *Bascom*, West. Jur., Sept. 1874.

STREET.

POWER OF LEGISLATURE TO VACATE. — MUNICIPAL CORPORATION. — It is settled law in California that the legislature possesses competent power to vacate a street in a city; that the legislature may delegate or commit such power to the municipal authorities of the city; that its exercise by the municipal authorities is dependent on the will and subject to the control of the legislature; and that after such power has thus been committed to the municipal authorities, the legislature may revoke it in part as well as in whole, or, without an express revocation, may itself exercise it in any particular instance. *Polack* v. *Trustees, &c.*, Pac. Law Rep., Sept. 1, 1874.

SUBSCRIPTION.

SUBSCRIPTION MADE ON BLANK SHEET OF PAPER. — A subscription to stock of a proposed railroad, made upon a blank piece of paper, which it was stipulated should not be regarded as binding, and should not be attached to the "heading" in which the terms and conditions of the association were set forth, until the subscriber had examined and approved of the same, is not a valid subscription, in the absence of the stipulated examination of the "heading," prior to the blank paper being attached. *Bucher* v. *Dillsbury & Mechanicsburg R. R. Co.*, Leg. Int., Sept. 11, 1874; Pittsb. L. J., Sept. 30, 1874; Leg. Chron., Sept. 19, 1874.

SUNDAY.

HIRING A HORSE on Sunday is not to be regarded as "secular business" within the prohibition of the statute. S. C. of Conn., *Frost* v. *Plumb*, Am. Law Reg., Sept. 1874.

TAXATION.

1. A TAX LEVIED AFTER THE DATE FIXED for the proper officers to certify the amounts required, upon a certificate filed after the date set down in the law, is void. *Mix* v. *The People*, Chicago L. N., Sept. 26, 1874.

2. DELEGATION OF POWER TO TAX. — The grant of full power to tax carries with it authority to use all means necessary to accomplish the object, the imposition of penalties for non-payment of taxes, &c. *Slack* v. *Ray*, Cent. L. J., Sept. 10, 1874.

TRADE-MARK.

SALE OF ISOLATED PART OF ARTICLE HAVING TRADE-MARK THEREON, ETC. — The plaintiff was a gunmaker, who manufactured rifles, purchasing some of the different parts from various makers, and putting them together to form a complete rifle, which, after having been viewed and approved by him, was stamped with his name and trade-mark on the lock-plate, as a guarantee that it had been examined and approved by him. He also fitted to the rifles levers manufactured by himself, for which he had taken out a patent, and these levers were also marked with his name. The plaintiff's rifles so marked with his name had a great reputation.

The plaintiff supplied rifles so marked and guaranteed by him to the government, and when they became unsuitable for government purposes, they were taken to pieces and some of the parts mutilated and sold as old stores. The defendants bought some of these old stores, including levers and lock-plates with the plaintiff's name and trade-mark upon them, and fitted them to old rifle barrels, which had been cut down to the size of carbine barrels, and were not suited to the action which formed part of the rifles as passed and guaranteed by the plaintiff. At this time the plaintiff's patent for the levers had expired. *Held*, that the defendants might be properly restrained from making or selling such fire-arms. *Richards* v. *Williamson*, Leg. Int., Sept. 4, 1874.

TRUST.

1. COURT OF EQUITY WILL NOT LEND ITS AID TO ESTABLISH A TRUST AT THE INSTANCE OF A VOLUNTEER. — A bill in equity was filed by August Votrain, a grandson of Etienne Deshayes, deceased, who died intestate, leaving complainant and eight other grandchildren as heirs, all of whom, with the administrator of the intestate's estate, were made parties defendant. The bill was based upon the following instrument: —

"Know all men by these presents, that I have assigned to August Votrain the sum of $12,000 of my property, which amount he is to draw before my property is divided; and he is to inherit one third of the rest of my property, which is to be divided into three parts, after my death. The $12,000 which I have assigned to him consists of $9,800 mortgages, and $2,200 notes, which I have assigned upon these conditions: First, that I retain said assigned mortgages and notes, and receive the interest thereof, during my life. Secondly, that I promise to pay said August Votrain, yearly, $200, the first payment to be made Jan. 1, 1872, and $200 every year thereafter. Thirdly, these foregoing conditions are expressly understood to be upon the condition that if the said August Votrain should die before my death, that the amount of property so assigned shall revert to me and remain my property, as if it had not been assigned to him, and this instrument of writing shall be null and void.

Belleville, Ill., September 6, 1871.

ETIENNE DESHAYES. [Seal.]

his

C. T. ELLES, Witness. AUGUST ⋈ VOTRAIN. [Seal.]"

mark.

The object of the bill was to have the complainant declared a *cestui que trust.*

Held, that the instrument was to be regarded as a mere testamentary disposition of donor's estate, not executed in conformity with the statute of wills, from which the court would be no more justified in inferring an intention on donor's part to constitute himself trustee during his life of the property out of which the twelve thousand were to be paid to the defendant, than if, instead of this instrument, he had made a will containing the same provision. That the complainant was a volunteer and the transaction executory, wherefore the bill could not be sustained. *Badgly* v. *Votrain*, Chicago L. N., Sept. 19, 1874.

2. POWER OF COURT TO CHANGE THE TERMS OF A TRUST. — In the year 1850 George Morton conveyed to A and B as trustees for his daughter, Christiana Morton, in consideration of natural love and affection and the sum of one dollar, certain real estate, "to have and to hold the said premises with the appurtenances unto the said parties of the second part, or the survivor of them, in trust for the benefit, use, and behoof solely of the said Christiana Morton, and the heirs of her body forever; and upon the decease of the said parties of the second part, then the legal title to the said premises is to be and remain in the said Christiana Morton during her natural life, with a remainder to the heirs of her body; and in case she should die without issue, then, in that case, the legal title to revert to the said party of the first part or his heirs."

It appeared from the evidence that the parties interested in the property were without means by which to support themselves or to pay the taxes which had for some time been paid by one of the trustees; that it was not possible to lease the property, and that it was in danger of being lost.

Held, that the case was such as to justify the interposition of a court of equity to change the terms of the trust and order a sale of the property. *Voris* v. *Sloan*, Mo. West. Jur., Sept., 1874.

3. CONSTRUCTION. — LIFE ESTATE. — REMAINDER. — The language, "and in case she should die without issue, then, in that case, the legal title to revert to the party of the first part or his heirs," held to create an unconditional vested life estate with remainder in the heirs at birth. *Ib.*

WILL.

1. A BEQUEST OF THE INTEREST OF A MORTGAGE for life is to be regarded as a specific legacy, and if the security is lost the legatee takes nothing. *Gallaher's App.*, Leg. Int., Sept. 4, 1874; Leg. Chron., Sept. 19, 1874; Pittsb. L. J., Sept. 9, 1874.

2. "DYING WITHOUT ISSUE" means usually an indefinite failure of issue, and such a limitation creates an estate tail. But the intent of a testator is to be gathered from the whole will, and such intent must prevail in its construction. The words, as used in the present instance, held to refer to a definite failure of issue, and to create a defeasible estate which terminated upon the death of the devisee. *Hickman* v. *Blackmore*, Leg. Int., Sept. 11, 1874.

3. PAROL EVIDENCE is admissible to show the number of acres in a farm described in a will as "the McKinstry Farm." *Clapsaddle* v. *Eberly*, Leg. Int., Sept. 23, 1874.

See TRUST, 2, 3.

DISTRICT COURT U. S. — DISTRICT OF MASSACHUSETTS.

[SEPTEMBER, 1874.]

BANKRUPTCY. — PRACTICE UNDER THE ACT OF 1874, IN RESPECT OF COMPOSITION BY CREDITORS.

IN RE HASKELL.

1. *A written proposition from the bankrupt, preceding the notice to creditors, and informing them what they are to be asked to accept, is not a necessary preliminary to composition.*
2. *The statement required in cases of composition is, virtually, the same as the schedule of assets filed with the petition.*
3. *A resolution of composition may be allowed, even though the party could not obtain a discharge upon the facts.*

LOWELL, J. Several objections are taken to the acceptance of the resolutions of creditors to accept a composition of twenty-five cents on the dollar.

Section seventeenth of the amended bankrupt act introduces a new feature into the system, by enabling a certain amount and proportion of the creditors to accept a composition which shall be binding on all the rest. Full power is given to the supreme court to make rules, but until the next session of that court the law, being in full operation, must be worked out as well as may be. Three points have been argued: —

1. That there should be a written proposition from the bankrupt, preceding the notice to creditors, to lay the foundation for their action, and to inform them what they were to be asked to accept.

There is much force in this objection, abstractly considered, and it may be that the rules will prescribe something on the subject, but the statute does not, I think, require it. The course of proceeding pointed out by the law seems to be for the creditors to meet and discuss, the debtor being present and answering all questions, and then they may not only accept or reject a proposition which was made and filed, ten days before, but the debtor may make and they may accept quite a different proposition from that which he came prepared to offer.

The creditors are to be notified of the time, place, and purpose of the meeting, but not necessarily of the precise proposition to be made; unless the matter should be carefully regulated, there might be danger of introducing too much precision, by requiring that there should be a written point of departure for these proceedings. We have taken this section from the English act of 1869, 32 & 33 Vict. chapter 71, section 126. Under that act, very many and careful rules have been made and forms have been prescribed (Nos. 106 and 108).

These forms do not contain, either in the application by the debtor or in the notice to his creditors, any intimation of what the proposition is likely to be. This shows that the judges construe that section in the way I have suggested; there seems to be no reason to say that the debtor must have made up his own mind what he will offer before he meets his creditors. He may be investigating his affairs and may need their advice and assistance.

2. A somewhat similar course of reasoning applies to the second objection, which is that the statement of assets produced at the meeting was insufficient. This was the schedule of assets already filed in bankruptcy. There is nothing in the mere words of the statutes to require any other or different statement than is required in bankruptcy, and the most obvious course would be to make it as much like that schedule as might be, which is the rule prescribed by the court in England.

It is true that such a schedule cannot inform creditors of such particulars as will enable them to decide understandingly upon an offer of composition. But what written statement will do this? The law requires the debtor to be present and to answer all inquiries, and the creditors are not bound to act until all such inquiries have been answered, including those by a majority or by a single creditor, and including a due inspection and explanation of the books.

All this had been done some weeks before by a committee of creditors who had reported to the others; so that there was no real lack of information in this case, and I do not think I could lay down any better general rule for the written statement than that in cases in which the sworn schedules have already been filed. They shall be used.

To consider the third objection in all its possible bearings would be tedious. The objecting creditor offered evidence which he insists proves that a preference to a considerable amount was made to one creditor in June, after the debtor was insolvent.

It is said that this fact would prevent the debtor's discharge, and therefore ought to prevent the acceptance of the resolutions, which, if recorded, is intended to work a discharge.

As I said at the hearing, I do not believe the statute intends that no debtor can compound with his creditors, under this section, who would not be able to obtain his discharge.

The law seems to leave it very much to the requisite number and amount of creditors, who, if all the facts are before them, may decide the whole matter. This thing had been known for weeks to all the creditors, and had been the subject of a report by a committee. The court has a discretion to accept or reject, as may be for "the best interest of all concerned." This means the best interest at the time being, all things considered.

In passing upon the acceptance of the resolution, I think the court ought to take into view all the circumstances, including, perhaps, the probability of a discharge in bankruptcy, and certainly, the conduct of the several parties, in its bearing on the composition. I have found nothing in this case which requires me to reject this resolution.

Resolution to be recorded.

NOTES OF NEW BOOKS.

MESSRS. BAKER, VOORHIS & Co. of New York announce new editions of *Bump's Bankruptcy*, and other works heretofore noticed.

They also announce an American edition of *Brice on Ultra Vires*, to be prepared by Ashbel Green, Esq.

CASES ON SELF-DEFENCE, with Notes by Messrs. L. B. Horrigan & Seymour D. Thompson, has been published by Messrs. Soule, Thomas & Wentworth of St. Louis.

MESSRS. T. & J. W. JOHNSON & Co. have in press and will soon publish the seventh American, from the eighth London, edition of *Roscoe's Criminal Evidence*, edited by Judge Sharswood.

Also, the fourth American edition of *White & Tudor's Leading Cases in Equity*, by H. B. Wallace and Hon. J. I. C. Hare.

THE SIXTH VOLUME of *Fisher's Patent Cases*, which had been partly completed by Mr. Fisher at the time of his death, will be finished by Messrs. Hatch & Parkinson, who assisted in the preparation of the earlier volumes, and be ready for delivery before the close of the present year.

Samuel A. Duncan, Esq., will continue the series. Robert Clarke & Co., of Cincinnati, publishers.

MESSRS. KAY & BRO., of Philadelphia, have commenced the publication of *Weekly Notes of Cases* decided in the courts of Pennsylvania. The plan is to give the points decided only, according to the English notion. The numbers issued demonstrate that it cannot fail to become almost a necessity to the bar of the state to whose interests it is confined.

The same publishers have ready *Wharton on Negligence*, and a new edition of *Hilliard on Injunctions*. They have in preparation a work on *Notice* (a subject which affords a field for authorship in an exceptional degree) by Geo. T. Bispham, Esq., and new editions of *Wharton on Homicide*, *Williams on Executors*, and *Leake's Law of Contracts*.

PRECEDENTS OF INDICTMENTS AND PLEAS, by Mr. Bishop, the well known author of the popular treatises on Criminal Law, is announced by Messrs. Little, Brown & Co.

M. E. DUNLAP, ESQ., of Erie, Penn., has published a pocket edition of an abridgment of Elementary Law especially designed for the use of students. Price $2.50.

THE AMERICAN LAW TIMES.

NEW SERIES. — DECEMBER, 1874. — VOL. I., NO. 12.

DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. ..... *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & Co.
Am. Law Rec. ..... *American Law Record*, Cincinnati, O., H. M. MOOS.
Am. Law Reg. ..... *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & Co.
Cent. L. J. ..... *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.
Chicago L. N. ..... *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS Co.
Daily Reg. ..... *Daily Register*, New York, 303 BROADWAY, N. Y.
Ins. L. J. ..... *Insurance Law Journal*, New York, C. C. HINE, 176 BROADWAY.
Int. Rev. Rec. ..... *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
Leg. Chron. ..... *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
Leg. Gazette ..... *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.
Leg. Int. ..... *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
Mo. West. Jur. ..... *Monthly Western Jurist*, Bloomington, Ill., THOMAS F. TIPTON.
Pac. Law Rep. ..... *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
Pittsb. L. J. ..... *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
West. Jur. ..... *Western Jurist*, Des Moines, Iowa, MILLS & Co.

ADMIRALTY.

See PLEADING AND PRACTICE, 1.

ATTACHMENT.

1. HOW MADE IN NEW YORK. — REQUISITES OF SEIZURE, ETC. — *Held*, that in the State of New York it is not necessary to make a manual seizure of the stock of associations or corporations, in order to make a

valid attachment, but it is sufficient to leave a warrant of attachment with either of the officers or agents of the association, or with the debtor holding such property, with a notice showing the property levied on; that the sheriff, by this action, acquires no actual dominion over the property, but the notice simply cautions the party on whom it is served, and prevents him paying the debt or delivering the property to the debtor.

Held, also, that a notice by the sheriff that he attaches all the property, bonds, mortgages, and promissory notes, including all the rights and shares of stock, &c., in the possession and under the control of the party levied on, is sufficient, and a particular description of the property and debts supposed to be in possession of the party served is not necessary. *O'Brien* v. *Mechanics' & Traders' Fire Ins. Co.*, Ins. L. J., Sept. 1874.

2. A PUBLIC OFFICER OF A STATE cannot be made liable by attachment, at the suit of an individual, for funds in his hands clothed with a trust under the authority of law. *Rollo* v. *Andes Ins. Co.*, Ins. L. J., Sept. 1874.

See EXEMPTIONS.

BANKRUPTCY.

1. JUDGMENT NOTES GIVEN A MONTH BEFORE THE FILING OF THE PETITION are not necessarily invalid. — STRONG, J., *Piper* v. *Baldy*, Leg. Int., Oct. 2, 1874; Pittsb. L. J., Oct. 14, 1874.

2. ACT OF '74 APPLICABLE TO PENDING CASES. — The act of '74 is applicable to pending cases. Mr. Justice MILLER, *In re King*, Cent. L. J., Oct. 8, 1874; Chicago L. N., Oct. 17, 1874; Albany L. J., Oct. 17, 1874.

3. COMPOSITION WITH CREDITORS. — HOW MAJORITY IS TO BE ASCERTAINED. — All creditors whose claims do not exceed fifty dollars must be disregarded in arriving at the majorities required in both cases. That is to say, in passing the resolution there must be a majority of the creditors assembled at the meeting, either in person or by proxy, excluding all whose claims do not exceed fifty dollars, to make the resolution operative; and in the confirmatory statement the number of signers required must be two thirds, after excluding from the whole number of creditors all whose claims do not exceed fifty dollars. *In re Wald*, Chicago L. N., Oct. 17, 1874; Cent. L. J., Oct. 23, 1874.

4. CONSTRUCTION OF ACT OF '74. — ITS EFFECT UPON THE EARLIER ACTS. — In both voluntary and compulsory cases commenced before the passage of the act of '74, the bankrupt may be discharged without reference to the question of the amount of assets or the number of creditors assenting, provided there is a compliance with the law in other respects. *In re Perkins*, Cent. L. J., Oct. 8, 1874; Albany L. J., Oct. 17, 1874.

5. IN CASE OF RENEWAL NOTES, in fixing the time the debt was contracted, the date of the original transaction should govern. *Ib.*

BOARDING-HOUSE.

See EXEMPTIONS.

BUILDING ASSOCIATION.

ULTRA VIRES. — INSURANCE. — A contract by a building association to insure a building in which it is interested is not *ultra vires*. *Chicago Building Co.* v. *Crowell*, Chicago L. N., Oct. 24, 1874.

COMMON CARRIER.

GOODS LOST BY ONE OF A NUMBER OF CONNECTING LINES. — Where a loss occurs upon one of several connecting lines suit may be maintained against the first line or the one doing the wrong. Beyond this the courts should decline to go.

WHERE THE FIRST LINE HAS ADJUSTED THE LOSS, if it sues, the proceedings must be against the line which is in fault. *Chicago & N. W. R. R. Co.* v. *N. Line Packet Co.*, Chicago L. N., Oct. 24, 1874.

See INSURANCE, 9.

CONSPIRACY.

See CONSTITUTIONAL LAW, 9.

CONSTITUTIONAL LAW.

1. AN ACT IN FURTHERANCE of the intent of a contract cannot be regarded as an attempt to change the contract. *Glenn* v. *Ayr*, Leg. Int., Oct. 2, 1874.

2. POLICE POWER OF STATES DEFINED AND INSTANCED. — The police power of the state may be exercised by precautionary measures against the increase of crime or pauperism, or the spread of infectious diseases from persons coming from other countries. The state may entirely exclude convicts, lepers, and persons afflicted with incurable disease; may refuse admission to paupers, idiots and lunatics, and others, who from physical causes are likely to become a charge upon the public, until security is afforded that they will not become such a charge; and may isolate the temporarily diseased until the danger of contagion is gone. *In re Ah Fong*, Leg. Gazette, Oct. 23, 1874; Pac. Law Rep., Oct. 13, 1874; Int. Rev. Rec., Oct. 12, 1874; Cent. L. J., Oct. 16, 1874.

3. THE EXTENT OF THE POWER OF THE STATE TO EXCLUDE A FOREIGNER FROM ITS TERRITORY is limited by the right of self-defence. Whatever outside of the legitimate exercise of this right affects the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of the general government, and is not subject to state control or interference. *Ib.*

4. THE 6TH ARTICLE OF THE TREATY BETWEEN THE UNITED STATES AND CHINA, adopted on the 28th of July, 1868, provides that Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by citizens or subjects of the most favored nation, and as the general government has not seen fit to attach any limitation to the ingress into the United States of subjects of those nations, none can be applied to the subjects of China. *Ib.*

5. THE 14TH AMENDMENT to the Constitution declares that no state

shall deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* the equal protection of the laws: *Held*, that this equality of protection implies not only equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others of the same class from all charges and burdens of every kind. Within these limits the power of the state exists, as it did previously to the adoption of the amendment, over all matters of internal police. *Ib.*

6. IMMIGRATION ACT OF 1870 EXPOUNDED AND CONSTRUED. — On the 31st of May, 1870, Congress passed an act declaring that "no tax or charge shall be imposed or enforced by any state upon any person immigrating thereto from a foreign country which is not equally imposed or enforced upon every person immigrating to such state from any other foreign country, and any law of any state in conflict with this provision is hereby declared null and void:" *Held*, 1st. That the term *charge*, as here used, means any onerous condition, and includes a condition which makes the right of an immigrant, arriving in the ports of the state, to land within the state depend upon the execution of a bond by a third party, not under his control, and whom he cannot constrain by any legal proceedings; and, 2d. That the statute of California, which prohibits foreign immigrants of certain classes arriving in the State of California by vessel from landing until a bond shall have been given by the master, owner, or consignee of the vessel that they will not become a public charge, and imposes no condition upon immigrants of the same class entering the state in any other way, is in conflict with the act of Congress. *Ib.*

7. A LAW WHICH PURPORTS TO DELEGATE THE POWER OF THE LEGISLATURE (*e. g.* what is known as a "local option" law) is unconstitutional and void. *Ex parte Wall*, Pac. Law Rep., Sept. 29, 1874.

8. THE ENFORCEMENT ACT is unconstitutional in so far as it assumes to regulate the right to vote. *United States* v. *Cruikshank*, Am. Law Reg., Oct. 1874.

9. THE 13TH, 14TH AND 15TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES CONSTRUED. — POWERS OF CONGRESS THEREUNDER. — JURISDICTION. — CONSPIRACY. — Where rights of individual citizens are not derived originally from the Constitution, but are part of the political inheritance from the mother country, the power of Congress does not extend to the enactment of positive laws for the protection of such rights, but only to the prevention of the states from violation of them.

But where a right is derived from the Constitution and affirmative legislation is necessary to secure it to the citizen, then Congress may pass positive laws for the enforcement of the right and for the punishment of individuals who interfere with it,

These principles apply to the 14th amendment equally with the rest of the Constitution, and there can be no constitutional legislation under that amendment for directly enforcing the privileges and immunities of citizens of the United States by original proceedings in the federal courts, where the only constitutional guaranty of such privileges is that no state shall pass any law to abridge them, and where the state has in fact passed no such laws.

The 13th amendment gave Congress power to pass positive laws for doing away with slavery, but it did not give power to pass laws for the punishment of ordinary crimes against the colored race any more than against any other race. That power remains to the states.

To constitute an offence of which Congress and the federal courts can take cognizance under this amendment, there must be a design to injure a person or deprive him of his right, by reason of his race, color, or previous condition of servitude.

The 15th amendment confers no right to vote. That is the exclusive prerogative of the states. It does confer a right not to be excluded from voting by reason of race, color, or previous condition of servitude, and this is all the right that Congress can enforce.

Semble, Congress may pass laws to protect this right under the 15th amendment from individual violation, although the laws of the state are not repugnant to the amendment.

But offences against the right to vote are not cognizable under the power of Congress, unless they have as a motive the race, color, or previous condition of servitude of the party whose right is assailed.

The *war of race*, whether it assumes the dimensions of civil strife and domestic violence, or is limited to private outrage, is subject to the jurisdiction of the United States; but outrage or violence, whether against colored people or white people, which lacks this motive and springs from the ordinary impulse of crime, is within the sole jurisdiction of the individual state, unless the latter by its laws denies to any race the full equality of protection.

An indictment for conspiracy to interfere with the right peaceably to assemble, &c., or with the right to bear arms, or "to deprive certain citizens of African descent of their lives and liberties without due process of law," where the state has not passed any law interfering with such rights or denying equal protection to all its citizens, is not sustainable in a United States court under any law that Congress had power to pass.

An indictment for conspiracy to deprive certain citizens of African descent of the free exercise and enjoyment of the right to the full and equal benefit of all laws and proceedings for the security of persons and property, which is enjoyed by white citizens, does not, in the absence of a specific allegation of a design to deprive the injured persons of their rights on account of their race, color, or previous condition of servitude, charge any offence cognizable in a United States court.

Semble, such an indictment is also bad for vagueness. *Ib.*

See QUARANTINE REGULATIONS.

CONTEMPT.

1. WHERE THERE IS ANOTHER MODE OF PUNISHMENT a court will not punish for contempt, although the act may have been committed in its presence. *In re Hirst*, Leg. Int., Oct. 23, 1874.

2. AN ATTORNEY UNDERTAKING TO OBTAIN BAIL for a client will be held to a strict responsibility for any fraud or deception practised upon the court. *Ib.*

3. POWER OF LOWER HOUSE OF CONGRESS. — The House of Repre-

sentatives has power to commit for contempt, and when a party is found guilty of a contempt, the order of the house directing his commitment is a complete protection to the speaker, who orders him into custody of the sergeant-at-arms. *Stewart* v. *Blaine*, Chicago L. N., Oct. 24, 1874.

CORPORATION.

LIABILITY OF CORPORATION FOR TRANSFER OF STOCK HELD IN TRUST. — A corporation is liable to a *cestui que trust*, under a trust of corporate stock declared on its books, where it transfers such stock upon the authority of a trustee without power to alienate or the consent of the *cestui que trust*. *Magwood* v. *So. Ca. R. R. & Bank*, Chicago L. N., Oct. 17, 1874.

CRIMINAL LAW.

1. INDICTMENT. — NUISANCE. — SELLING INTOXICATING LIQUORS. — An indictment for nuisance is good if it contains an allegation of the sale of intoxicating liquors without adding that they were so sold in violation of law. *State* v. *Jordan*, West. Jur., Oct. 1874.

2. MURDER. — PRESUMPTIONS AS TO. — *Primâ facie* every unlawful killing is murder, for malice is presumed. But this presumption rises no higher than murder of the second degree; and the burden is on the Commonwealth to show murder of the first degree. *O'Mara* v. *The Commonwealth*, Leg. Int., Oct. 16, 1874.

3. COMPETENCY OF JUROR. — OPINION FOUNDED ON RUMOR. — When the opinion of a juror as to the prisoner's guilt has not become a fixed belief, but is founded on rumors or reports which he feels conscious he can dismiss, and he is able to say that he can fairly try the prisoner on the evidence, free from such opinions or impressions, he is competent to serve as a juror. *Ib.*

CUSTOM.

See INSURANCE, 2, 13.

EJECTMENT.

See PLEADING AND PRACTICE, 2, 3.

ENFORCEMENT ACT.

See CONSTITUTIONAL LAW, 8.

EVIDENCE.

1. DEFENDANT'S WIFE. — RES GESTÆ. — Evidence of what defendant's wife said to him and his reply or failure to reply is admissible as part of the *res gestæ*. *O'Mara* v. *The Commonwealth*, Leg. Int., Oct. 16, 1874.

2. DECLARATIONS MADE BY A PARTY IN POSSESSION of property that he was the owner may be properly admitted where the question of the title of the property is at issue. *Annick* v. *Young*, Chicago L. N., Oct. 17, 1874.

3. INADMISSIBILITY OF EVIDENCE OF CONNIVANCE OF AGENT. — After the insurance was effected the insured removed a part of his household furniture, and at the time of making proof of loss, included it in the

amount destroyed. *Held*, that evidence tending to show that this property was included in the proof of loss at the instigation and by the advice of the agent of the company, was improperly admitted. *Hanover Fire Ins. Co.* v. *Mannassan*, Ins. L. J., Sept. 1874.

See INSURANCE, 2, 13.

EXEMPTIONS.

FURNITURE. — BOARDING-HOUSE. — ATTACHMENT. — A person who keeps a boarding-house is not entitled to a greater exemption of furniture by reason of the fact.

If furniture, however, is exempt, its having been stored will not affect the exemption and render it liable to attachment. *Weed* v. *Dayton*, Am. Law Reg., Oct. 1874.

FRANC.

See IMPORTS.

HOUSE OF REPRESENTATIVES.

See CONTEMPT, 3.

IMMIGRATION.

See CONSTITUTIONAL LAW, 6.

IMPORTS.

VALUE OF FRANC. — In fixing the dutiable value of importations the franc is to be estimated at $18\frac{6}{10}$ cents. *Richard* v. *Arthur*, Int. Rev. Rec., Oct. 5, 1874.

INNOCENT HOLDER.

MORTGAGE. — PROMISSORY STATEMENTS. — A party relying upon representations made by the agents of a railroad company that a contemplated road would benefit him gave a mortgage upon certain land to secure the payment of a subscription to the stock. The mortgage thus obtained was assigned to a director of the company who was a creditor thereof, and who filed his bill to foreclose. *Held*, that the law gives a different effect to a representation of existing facts from that given to a representation of facts to come into existence, under which principle, and for other reasons peculiar to the case, the complainant was to be regarded as an innocent holder for value. *Sawyer* v. *Prickett*, Leg. Gazette, Oct. 2, 1874.

INSURANCE.

1. WARRANTY DEFINED. — In answer to one of the questions of an application for a policy against fire, it was stated that there was a force-pump being constructed on the premises. The insurance was effected in May, and a loss by fire occurred in the following October, at which time there was no pump in the building. *Held*, that there was no warranty; that the company might have protected itself by rescinding the contract. *Howell* v. *Hartford Fire Ins. Co.*, Ins. L. J., Sept. 1874.

2. CUSTOM OF AGENT TO NOTIFY PARTIES THAT PREMIUMS ARE

DUE. — CHANGE OF RESIDENCE. — *Held*, that if it was the custom of the agent to notify the policy holders when their payments became due, and if the insured gave proper notice to the agent of his change of residence, and if the failure to pay the premium was owing to the want of notice by the agent when the premium became due, the policy was not forfeited. *Meyers* v. *Mut. Life Ins. Co.*, Ins. L. J., Sept. 1874.

3. THE CLERK OF A GENERAL AGENT, paid by the company, who with his knowledge and assent collects the premiums and exercises similar acts of authority, is to be regarded as an agent of the company. *Ib.*

4. WAIVER OF FORFEITURE BY ACT OF AGENT. — *Held*, that if the conduct of the agent, by laxity in the collection of premiums when due and otherwise, had been such as to naturally lead the insured to understand that a strict compliance with the terms of the policy would not be insisted upon, an offer to pay the premium a few days after due was in time, although the insured was dead. *Ib.*

5. "PLATE" DEFINED. — FORKS AND SPOONS are not included in the word "plate." *Hanover Fire Ins. Co.* v. *Mannassan*, Ins. L. J., Sept. 1874.

6. BOOKS, FURNITURE, and analogous articles are not included in a policy unless covered by special agreement. *Commonwealth* v. *Hide & Leather Ins. Co.*, Ins. L. J., Sept. 1874.

7. WHERE INSURERS ISSUE A POLICY UPON THEIR OWN EXAMINATION, without the application contemplated in the policy, such application will be deemed to have been waived. *Ib.*

8. "FREIGHT CARS OWNED AND USED BY THE COMPANY" includes cars belonging to other companies. *Ib.*

9. INSURABLE INTEREST. — COMMON CARRIER. — The A. R. R. Co. had stipulated to indemnify the B. R. R. Co. from loss of goods while in transit upon its line or on its premises. *Held*, that the B. R. R. Co. was liable as a common carrier for any loss of such goods, and, therefore, had an insurable interest in them. *Ib.*

10. AGREEMENT TO INSURE WHERE NO PREMIUM HAS BEEN PAID. — An agreement between the broker or agent of the property owner and the clerk and surveyor of an insurance agency to insure a building, no premium having been paid, does not constitute a valid contract of insurance, but only the preliminaries to a contract. *Dwining* v. *Phœnix Ins. Co.*, Ins. L. J., Sept. 1874.

11. PREMIUM NOTE TO BE APPLIED AS PARTIAL PAYMENT IN CASE OF LOSS. — Defendant gave his premium note to the plaintiff on account of a policy of insurance on a vessel. Before the policy expired the plaintiff failed, and his policy was reinsured in two other companies, which paid the loss when due less the premium note. The premium note having been transferred and assigned to a third party, action was brought for its payment by the original payee. *Held*, that the clause in the policy which provides that in case of loss the premium note and all sums due should first be deducted from the amount of the claim, contemplates that if there is a loss, the premium note is to be applied to the partial payment of it when due, that the one is to satisfy the other *pro tanto*. *Columbian Ins. Co.* v. *Bean*, Ins. L. J., Sept. 1874.

12. AGREEMENT THAT RISK SHALL NOT BE INCREASED. — JUG OF

PETROLEUM KEPT FOR MEDICINAL PURPOSES. — A policy contained the following condition: "If after insurance has been effected, either by original policy or renewal thereof, the risk shall be increased by any means whatever within the control of the assured, or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect." *Held*, that keeping a jug of petroleum on the premises for medicinal purposes was an infraction of the policy. *Williams* v. *People's Fire Ins. Co.*, Ins. L. J., Sept. 1874.

13. AGENT CANNOT WAIVE FORFEITURE IN MARYLAND UNLESS HE HAS POWER TO MAKE ORIGINAL CONTRACTS OF INSURANCE. — It is law in Maryland that no usage in violation of the terms of a policy, no matter how general, can be shown after the policy has lapsed, to establish a waiver of forfeiture by an agent. No agent can waive the forfeiture unless he has power to make original contracts of insurance, nor can he revive a policy which has lapsed. *Bushby* v. *No. America Life Ins. Co.*, Ins. L. J., Sept. 1874.

14. THE LAW OF VIRGINIA AS TO FOREIGN COMPANIES DISCONTINUING BUSINESS IN THE STATE. — Under the Virginia act of February 3, 1866, when a foreign insurance company shall cease to do business in the state, and its liabilities, fixed or contingent, to citizens of the state, shall have been satisfied or terminated, the treasurer is authorized to deliver to such company the bonds and other securities deposited with him. Though the company has ceased business in the state, and its liabilities to citizens of the state have been satisfied or terminated, the bonds in the hands of the treasurer cannot be attached by a foreign creditor; but they must be delivered by the treasurer to the company. *Rollo* v. *Andes Ins. Co.*, Ins. L. J., Sept. 1874.

See BUILDING ASSOCIATION; EVIDENCE, 3.

INTERNAL REVENUE.

WHAT CONSTITUTES SUFFICIENT WARRANT FOR SEIZURE. — A duplicate list of the return made by an assistant assessor is not a sufficient warrant for the seizure of property. A copy of the assessment certified by the assessor is necessary. *Allen* v. *Bailey*, Int. Rev. Rec., Oct. 19, 1874.

JUDGMENT NOTE.

See BANKRUPTCY, 1.

JURISDICTION.

STATE AND U. S. COURTS. — A state court will not interfere to restrain a ministerial officer of a United States court where the act of such officer is in connection with a suit pending in the latter court. *Chapin* v. *James*, Leg. Gazette, Oct. 23, 1874; Chicago L. N., Oct. 24, 1874.

See CONSTITUTIONAL LAW, 5, 9.

JUROR.

See CRIMINAL LAW, 3.

LIBEL.

A TELEGRAPHIC MESSAGE may be libellous which would not have been libellous if sent by mail in a sealed envelope. *Williamson* v. *Freer*, Chicago L. N., Oct. 17, 1874.

LIMITED PARTNERSHIP.

See PARTNERSHIP.

MECHANICS' LIEN.

WHERE THERE ARE LIENS ON TWO BUILDINGS, the buildings are to be regarded as distinct and independent, even if they adjoin each other and are connected. *Hudnit* v. *Roberts*, Leg. Int., Oct. 16, 1874.

MORTGAGE.

See INNOCENT HOLDER.

NEGLIGENCE.

1. RAILWAY. — PRIVATE CROSSING. — Where a railroad company provides a private crossing at a place where it is under no obligation to do so, and furnishes necessary gates or bars, and uses reasonable care and diligence to keep them closed, it is not responsible for the negligence of the person for whose benefit the crossing has been provided. *Henderson* v. *Chicago, R. I. & P. R. W. Co.*, West. Jur., Oct. 1874.

2. CONTRIBUTORY NEGLIGENCE INSTANCED. — Plaintiff, a youth, eighteen years of age, was injured by stepping upon a loose board in the sidewalk. It appeared that he was familiar with the condition of the sidewalk, knew it to be unsafe, and that with such knowledge he was passing hastily and recklessly over it when the injury occurred. It also appeared that there was another sidewalk in proper repair contiguous to the unsafe one which plaintiff might have used. *Held*, that there could be no recovery. *Lovenguth* v. *City of Bloomington*, Mo. West. Jur., Oct. 1874.

NUISANCE.

See CRIMINAL LAW, 1.

PARTNERSHIP.

LIMITED PARTNERSHIP. — SPECIAL PARTNER NOT LIABLE FOR CERTAIN ACTS AFTER DISSOLUTION. — A limited partnership existed between A and B as general, and C and D as special partners, upon the expiration of which the business was continued by A, B, and C, D retiring. Subsequently D, being unable to obtain a settlement, filed a bill which resulted in the appointment of a receiver and an injunction restraining the defendants from receiving the assets. Afterward the parties came to a settlement whereby D obtained from his partners a bond given by E to C, and by C assigned to D, and also a note made by A and B, the general partners, to F, and by F indorsed and partly paid to D. *Held*, that by receiving the claims D had not made himself liable as a general partner. *Pusey* v. *Dusenberry*, Leg. Int., Oct. 9, 1874.

PATENT.

1. THE PATENT OF THE LOCOMOTIVE ENGINE SAFETY TRUCK COMPANY is not invalid for want of novelty in the invention, for when in combination with a locomotive engine, it is substantially a different truck from any other in use. This combination is a patentable invention. *Locomotive Eng. S. T. Co.* v. *P. R. R.*, Leg. Int., Oct. 9, 1874.

2. MERE FORBEARANCE TO APPLY FOR A PATENT during the progress of experiments, and until the party had perfected his invention and tested its value by actual practice, affords no just ground for presuming an abandonment. *Ib.*

PATENT (LAND).

1. PATENT DEFINED. — A patent is an instrument by which the government passes its title. If the government has no title at the time the patent is issued none passes by its execution. *Patterson* v. *Tatum*, Pac. Law Rep., Oct. 6, 1874.

2. WHEN PATENT MAY BE IMPEACHED COLLATERALLY. — If a patent is void on its face, or the issuing thereof was without authority or prohibited by statute, or the state had no title, it may be collaterally impeached in an action of ejectment. *Ib.*

PLEADING AND PRACTICE.

1. APPEAL IN ADMIRALTY. — An appeal in admiralty has the effect to vacate the decree from which it is taken *in toto*. Wherefore an order of a circuit court merely affirming the decree of the district court, and nothing more, is not a final decree from which an appeal will lie to the supreme court. *The Lucille*, Leg. Gazette, Oct. 16, 1874.

2. LICENSE TO BUILD RAILROAD. — EJECTMENT. — Where a party licenses a railroad company to construct its road upon his land, upon certain conditions subsequent which are not complied with, ejectment is not the proper remedy. The injured party should sue for specific performance or for damages. *Baker* v. *Chicago, R. I. & P. R. R. Co.*, Cent. L. J., Oct. 8, 1874.

3. CONSTRUCTION OF RAILROAD ON LAND OF PARTY. — EJECTMENT. — A party who has permitted a railroad to enter upon his land cannot maintain ejectment. *Provost* v. *Chicago, R. I. & P. R. R. Co.*, Cent. L. J., Oct. 8, 1874.

4. AN OFFER DURING THE ARGUMENT to permit an examination by a microscope is too late.. *Howell* v. *Hartford Fire Ins. Co.*, Ins. L. J., Sept. 1874.

POLICE POWER OF STATE.

See CONSTITUTIONAL LAW, 2.

PROMISSORY NOTE.

ACCOMMODATION INDORSEMENT OF FIRM NAME. — NOTICE. — Usually the fact that the maker of an indorsed note takes it to a bank to be dis-

counted on his own account is notice to the bank that the indorsement is an accommodation indorsement.

If the indorsement be that of a firm, the bank is bound to learn whether the signer had authority to make the indorsement. *Lemoine* v. *Bank of North America*, Cent. L. J., Oct. 23, 1874.

PUBLIC OFFICER.

See ATTACHMENT, 2.

QUARANTINE REGULATIONS.

STATE CANNOT IMPOSE TONNAGE TAX. — A state cannot impose a tonnage tax on foreign vessels to meet the expenses of quarantine regulations. *Peete* v. *Morgan*, Legal Gazette, Oct. 2, 1874; Pittsb. L. J., Oct. 14, 1874.

QUO WARRANTO.

A PRIVATE CITIZEN has not, under ordinary circumstances, a right to ask for a *quo warranto* to oust a member of a city council. *Commonwealth* v. *Horne*, Leg. Int., Oct. 23, 1874.

REMOVAL OF CAUSES.

CONSTRUCTION OF "FINAL HEARING OR TRIAL," AS USED IN ACT OF MARCH 2, 1867. — "At any time before the final hearing or trial of the suit," as used in the Act of March 2, 1867, means any time before the last hearing or last trial which can be had under existing laws. *Ins. Co.* v. *Dunn*, Leg. Gazette, Oct. 16, 1874.

NOTES OF NEW BOOKS.

MESSRS. HURD AND HOUGHTON, New York, The Riverside Press, Cambridge, have now ready the third volume of Judge Bennett's *Fire Insurance Cases*. Price, $7.50.

THE SECOND EDITION of *Freeman on Judgments*, A. L. Bancroft & Co., San Francisco, publishers, has made its appearance. It is better than the first in that it is materially enlarged. The work has already taken rank as one of the most conscientious and useful of recent American law books, and deserves all that has been said in its favor.

CAUSES CELEBRES is the title of an attractive series announced by Messrs. Cockcroft & Co., of New York. The title imports the nature of the work. It is proposed to present the arguments, testimony, and opinions, with the incidents of the cases *in extenso*. The trial of Queen Caroline will be embraced in volumes 1 and 2.

MESSRS. CLAXTON, REMSEN & HAFFELFINGER, of Philadelphia, have issued the second edition of *Flanders on Insurance*. Perhaps the distinctive characteristic of Mr. Flanders' treatment of his subject is a pronounced terseness of statement involving a clear expression of what he conceives to be the law. This feature renders the work especially useful as a manual. It is happily so printed as to enhance the merit of the author's method. Price, $7.50.